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PREFACE
TO
EIGHTH AMERICAN EDITION.

In the present edition the author's admirable work has been carefully reproduced, Judge Sharswood's notes to the last American Edition are reprinted intact, and his method of annotation followed. The cases in the Courts of last resort in the various States, of a date subsequent to that of the last edition, as well as those reported in the several law journals and magazines have been collated, and such of them inserted, to the number of twenty-five hundred, as illustrate the subject-matter; and the endeavor has been made to call attention to points in regard to which the law in the United States differs from that set forth in the text.

A feature not to be found in any preceding edition is the table of the cases cited in the notes, which, together with the additions made to the index, will, it is hoped, facilitate reference and add, if possible, to the usefulness of the book.

The Editor takes this occasion to express his most cordial thanks to Samuel Hinds Thomas and Philippus W. Miller, Esqrs., of this Bar, to whose untiring and able assistance, what is believed to be the present completeness and accuracy of this work is so largely due.

PHILADELPHIA, 1888.

F. L. W.

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TO THE SEVENTH AMERICAN EDITION.

That this work in England has gone through Eight Editions and in America Six, and that the public is now presented with the Seventh, is a sufficient indication of the value attached to it by the profession.

It has been found in practice to be a most complete compend of the Law of Criminal Evidence, and the best *vade mecum* of the advocate on trials.

An excellent arrangement, making it a book of easy reference, and great accuracy and perspicuity, as well as fullness in its references to authorities, have contributed to make it thus popular.

The American notes have been carefully revised, and the cases added to its present time.

G. S.

PHILADELPHIA, November, 1874.

PREFACE.

No material alteration has been made in the arrangement of this Work in the present Edition. The greatest care has, however, been taken to insure the correctness of the text, and to insert whatever is useful and within the scope of the book. By the excision of obsolete matter and useless repetitions, the editor has been able, notwithstanding the insertion of many new cases and statutes, to confine the text within reasonable limits, so that the present Edition contains only twenty more pages than the last, which was published in 1877. The subjects of Explosives, Corrupt Practices at Elections, Bankruptcy, etc., have, in consequence of the new statutes passed with reference to those subjects, necessarily taken up more space than in previous Editions.

Some considerable and interesting changes have taken place since the last Edition in the practice upon criminal trials as to the competency of the defendant (and the defendant's husband or wife, as the case may be) to give evidence. Thus in certain cases under the Conspiracy and Protection of Property Act, 1875, the respective parties to the "contract of service," and their husbands and wives, are competent witnesses. In like manner, under the 40 Vict. c. 14, defendants and their wives and husbands are compellable to give evidence upon indictments for non-repair of, or nuisance to highways. By the Corrupt Practices Prevention Act, 1883, and the Married Women's Property Acts, 1882 and 1884, defendants and their husbands and wives are competent, and in some cases compellable, to give evidence. Also upon an indictment for sending an unseaworthy ship to sea the defendant may, if he pleases, give evidence. These changes in the law are re-

ferred to in the text, and may be taken as indications of a desire on the part of the Legislature to widen the law of evidence with regard to the competency of witnesses.

The statutes and cases have been brought down to the present time.

The Editor's best thanks are due to his Friend Mr. Kennedy of the Midland Circuit, Recorder of Grantham, for his able assistance during the preparation of this Edition.

HORACE SMITH.

4, PAPER BUILDINGS, TEMPLE,
July, 1884.

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A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES.

THE general rules of evidence are the same in criminal and in civil proceedings. "There is no difference as to the rules of evidence," says Abbott, J., "between criminal and civil cases: what may be received in the one may be received in the other; and what is rejected in the one ought to be rejected in the other." *R. v. Watson*, 2 Stark. N. P. C. 155, 3 E. C. L.; *R. v. Murphy*, 8 C. & P. 306, 34 E. C. L. The enactments, however, of the Common Law Procedure Act, 1854, which materially altered the rules of evidence in certain cases, are, by sect. 103, confined to courts of civil judicature, though some of the provisions of that statute have been extended to criminal cases by subsequent legislation.

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Best evidence. It is the first and most signal rule of evidence that the best evidence of which the case is capable shall be given; for if the best evidence be not produced, it affords a presumption that it *would make against the party neglecting to produce it. *Gilb.* [*2

Ev. 3 Bull. N. P. 293, per Jervis, C. J., in *Twyman v. Knowles*, 13 C. B. 224, 76 E. C. L.; Best on Ev., Pt. 1, ch. 1, ss. 87 & 89.¹

Best evidence—chattels. Primary evidence of the contents of written documents is required, as will be presently seen, in almost every case; but with regard to the state or quality of a chattel not produced in court, it would seem that secondary evidence may be given. On the trial of an indictment for endeavoring to obtain an advance from a pawnbroker upon a ring by false pretences, evidence was tendered to show that the prisoner had offered another ring to another pawnbroker upon a previous day; this ring was not produced, but the pawnbroker stated that it was a sham. The evidence was held admissible. Lord Coleridge, C. J., made the following remarks:—"No doubt if there was not admissible evidence that this ring was false, it ought not to have been left to the jury; but though the non-production of the article may afford ground for observation more or less weighty, according to circumstances, it only goes to the weight, not to the admissibility of the evidence, and no question as to the weight of this evidence is now before us. Where the question is, as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that when the issue is as to the state of a chattel, *e. g.*, the soundness of a horse or the equality of the bulk of the goods to the sample, the production of the chattel is primary evidence, and that no other evidence can be given till the chattel is produced in court for the inspection of the jury. The law of evidence is the same in criminal and civil suits."² *R. v. Francis*, L. R. 2 C. C. 128; 43 L. J., M. C. 97. As to an inscription on a ring see *R. v. Farr*, *post*, p. 9.

¹ *Taylor v. Riggs*, 1 Pet. S. C. Rep. 596; *Cutbush v. Gilbert*, 4 S. & R. 551; *Duckwel v. Weaver*, 2 O. 13; *Fitzgerald v. Adams*, 9 Ga. 471. The rule which requires the production of the best evidence is applied to reject secondary evidence which leaves that of a higher nature behind in the power of the party; but not to reject one of several eye witnesses to the same facts, for the testimony of all is in the same degree. *United States v. Gilbert*, 2 Sumner, 19. "When there are several eye witnesses to the same facts, they may be proved by the testimony of one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive, but still it is not incompetent." . . . "A witness who has seen a party write several times is a good witness to prove his handwriting. But a clerk in the counting room of the party, who has seen him write innumerable times, would be in many cases a more satisfactory witness to prove the handwriting. But nobody can doubt that each would be a competent witness." Per Story, *Id.* 81. So the admissions of the prisoner that he had stolen from the person of another are not to be excluded though the person from whom the property was stolen is not produced as a witness. *Commonwealth v. Kenney*, 12 Met. 235. See also, *Shoenberger v. Hachman*, 37 Pa. St. 87; *Richardson v. Milburn*, 17 Md. 67. The testimony of a bystander, who overheard a conversation, is not secondary evidence of such conversation. *Peeples v. Smith*, 8 Rich. 90. S.

² Thus ranchmen accustomed to ride in quest of stock over a range, may give their opinion of the number of stock of a particular brand upon that range, if it is the best attainable evidence, though they may have no particular interest or charge in that stock. *Albright v. Corley*, 40 Tex. 105.

Best evidence—written instruments. The most important application of this principle is that which rejects secondary and requires primary evidence of the contents of written documents of every description, by the production of the written documents themselves.¹ The rule was so stated by the judges in answer to certain questions put to them by the House of Lords on the occasion of the trial of Queen Caroline (2 B. & B. 286, 6 E. C. L.), and is perfectly general in its application; the only exceptions to it being founded on special grounds. These may be divided into the following classes:—(1.) Where the written document is lost or destroyed: (2.) Where it is in the possession of an adverse party who refuses or neglects to produce it: (3.) Where it is in the possession of a party who is privileged to withhold it, and who insists on his privilege: (4.) Where the production of the document would be, on physical grounds, impossible, or highly inconvenient: (5.) Where the document is of a public nature, and some other mode of proof has been specially substituted for reasons of convenience. It is apparent, therefore, that, in order to let in the secondary evidence in these cases, certain preliminary conditions must be fulfilled; what these conditions are we shall explain more particularly when we come to treat of Secondary Evidence.

It is not necessary, in every case where the fact that is to be proved has been committed to writing, that the writing should be produced, but (unless the contents of the written document is itself a fact [*3 in issue] only in those cases where the documents contain statements of facts, which, by law, are directed or required to be put in writing, or where they have been drawn up by the consent of the parties for the express purpose of being evidence of the facts contained in them. Indeed, in many cases the writing is not evidence, as in the case of *R. v. Laver*, *infra*, p. 4.

The following cases are cited as instances of the general rule. Upon an indictment for setting fire to a house with intent to defraud an insurance company, in order to prove that the house was insured, the policy must be produced as being the best evidence, and the insurance office cannot give any evidence from their books unless the absence of the policy is accounted for. *R. v. Doran*, 1 Esp. 126; *R. v. Kitson*,

¹ *Hampton v. Windham*, 2 Root, 199; *Benton v. Craig*, 2 Miss. 198; *Cloud v. Patterson*, 1 Stew. 394; *Campbell v. Wallace*, 3 Y. 271; *United States v. Reyburn*, 6 Pet. 352. If a witness in the course of his examination be asked to testify respecting a transaction, before the question is answered, it is competent for the other party to inquire and know whether the transaction be in writing, and if it be, the witness cannot be permitted to give parol evidence on the subject. *Rice v. Bixler*, 1 W. & S. 445. Parol evidence cannot be given of the contents of writings, unless their non-production is first accounted for. *Farrell v. Brennan*, 32 Mo. 328; *Cincinnati Railroad Co. v. Cochran*, 17 Md. 516; *Guerin v. Hunt*, 6 Mian. 375. S.

On the admission of parol evidence to explain, modify or contradict written instruments, see *Mott v. Richtmeyer*, 57 N. Y. 49; *Shirmer v. Williams*, 38 N. Y. S. C. 180; *Hamman v. Keigwin*, 39 Tex. 34; *Adams v. Hicks*, 41 Tex. 239; *Spears v. Ward*, 48 Ind. 541; *Wharton v. Douglass*, 76 Pa. St. 273; *Richards v. Millard*, 56 N. Y. 574; *Rohrbacher v. Ware*, 37 Ia. 85. The writer of a letter who is not a party to the action cannot be permitted to testify as to the sense in which he used a word occurring therein. *Harrison v. Kirke*, 38 N. Y. S. C. 396. As to the right of a party in the matter. *Com. v. Damon*, S. C. Mass., 1884 (17 Rep. 559).

1 Dears. C. C. 187; 22 L. J., M. C. 118. Upon the same principle, the records and proceedings of courts of justice, existing in writing, are the best evidence of the facts there recorded. As, for instance, where it was necessary to prove the day on which a cause came on to be tried, Lord Ellenborough said that he could not receive parol evidence of the day on which the court sat at nisi prius, as that was capable of other proof by matter of record. *Thomas v. Ansley*, 6 Esp. 80. *Vide post*, Documentary Evidence. So, on an indictment for disturbing a Protestant congregation, Lord Kenyon ruled that the taking of the oaths under the Toleration Act, being matter of record, could not be proved by parol evidence. *R. v. Hube, Peake*, N. P. 180; 5 T. R. 542. In *R. v. Rowland*, 1 F. & F. 72, Bramwell, B., held that on an indictment for perjury, in order to prove the proceedings of the county court, it was necessary to produce either the clerk's minutes, or a copy thereof bearing the seal of the court; the county court act (9 & 10 Vict. c. 95, s. 111) directing that such minutes should be kept, and that such minutes should be admissible as evidence. And it has been said generally, that where the transactions of courts which are not, technically speaking, of record are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic modes of proof which the law recognizes. 3 Stark. Ev. 1043, 1st ed. On indictments for perjury, where it appears that there was an information in writing, such writing is the best evidence of the information, and must be produced. *R. v. Dillon*, 14 Cox, C. C. 4. See *post*, tit. "Perjury." On an indictment under the repealed statute 8 & 9 Will. 3, c. 26, s. 81, for having coining instruments in possession, it was necessary to show that the prosecution was commenced within three months after the offence committed. It was proved, by parol, that the prisoners were apprehended within three months, but the warrant was not produced or proved, nor were the warrant of commitment or the depositions before the magistrate given in evidence to show on what transactions, or for what offence, or at what time, the prisoners were committed. The prisoners being convicted, a question was reserved for the opinion of the judges, who held that there was not sufficient evidence that the prisoners were apprehended upon transactions for high treason respecting the coin within three months after the offence committed. *R. v. Phillip, Russ. & Ry.* 369.

But, on the other hand, where a memorandum of agreement was drawn up, and read over to the defendant, which he assented to, but did not sign, it was held that the terms of the agreement might be proved by parol. *Doe v. Cartwright*, 3 B. & Ald. 326, 5 E. C. L.; *Trewhitt v. Lambert*, 10 A. & E. 470, 37 E. C. L. So facts may be proved by parol, *4] though *a narrative of them may exist in writing. Thus a person who pays money may prove the fact of payment, without producing the receipt which he took.¹ *Rambert v. Cohen*, 4 Esp. 213. So where, in

¹ As a general rule, when there is written evidence of a fact, parol or secondary evidence is inadmissible; but written acknowledgments and receipts of payment, when such payments are in issue, are exceptions to the rule. *Conway v. State Bank*, 13 Ark. 48; *Weatherford v. Farrar*, 18 Mo. 474; *Southwick v. Hayden*, 7 Cow. 344;

trover to prove the demand the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, Lord Ellenborough ruled that it was unnecessary to produce the writing. *Smith v. Young*, 1 Campb. 439. So a person who takes notes of a conversation need not produce them in proving the conversation, as they would not be evidence if produced. Thus in *R. v. Laver*, a prosecution for high treason, Mr. Slaney, an under-secretary of state, gave evidence of the prisoner's confession before the council, though it had been taken down in writing. 12 Vin. Ab. 96. Similar illustrations of the same principle will be found under the title, Examination of Prisoner. So on an indictment for perjury committed upon a trial in the county court, any witness, present at the time, is competent to prove what evidence was given, inasmuch as a county court judge is not bound to take any notes. *R. v. Morgan*, 6 Cox, Cr. C. 107, per Martin B.; *Harmer v. Bean*, 3 C. & K. 307, per Parke, B. So the fact of a marriage may be proved by a person who was present, and it is not necessary to produce the parish register as the primary evidence. *Morris v. Miller*, 1 W. Bl. 632. So the fact that a certain person occupied land as tenant may be proved by parol, although there is a written contract. *R. v. Inhab. of Holy Trinity*, 7 B. & C. 611, 14 E. C. L.; 1 M. & R. 444. But the parties to the contract, the amount of rent and the terms of the tenancy can only be shown by the writing. *S. C. and Strother v. Barr*, 5 Bing. 136, 15 E. C. L.; *Doe v. Harvey*, 8 Bing. 239, 21 E. C. L.; *R. v. Merthyr Tydvil*, 1 B. & Ad. 29, 20 E. C. L.

In the case of *printed* documents, all the impressions are originals, and according to the usual rule of multiply originals, any copy will be primary evidence.¹ Thus, where on a prosecution for high treason, a copy of a placard was produced by the person who had printed it, and offered in evidence against the prisoner, who it appeared had called at the printer's, and taken away twenty-five copies, it was objected that the original ought to be produced, or proved to be destroyed, or in the possession of the prisoner; but it was held that the evidence was admissible; that the prisoner had adopted the printing by having fetched away the twenty-five copies; and that being taken out of a common impression, they must be supposed to agree in the contents. "If the placard," said Mr. Justice Bayley, "were offered in evidence to show the contents of the original manuscript, there would be great weight in the objection, but when they are printed they all become originals; the manuscript is discharged; and since it appears that they are from the same press, they must be all the same." *R. v. Watson*, 2 Stark. N. P. 130, 3 E. C. L.

Heckert v. Haine, 6 Bin. 16; *Wishart v. Downey*, 15 S. & R. 77. But parol evidence that a receipt given for a note acknowledged that the note was in full payment of goods sold is inadmissible, when the receipt is in existence and no measures have been taken to procure it. *Townsend v. Atwater*, 5 Day, 298. S.

¹ A printed advertisement cannot be read without search after the original manuscript. *Sweigart v. Lowmarter*, 14 S. & R. 200. S.

It has been said that the transactions and proceedings of public meetings may be proved by parol, as in the case of resolutions entered into, although it should appear that the resolutions have been read from a written or printed paper. And in support of this proposition a case is referred to where, in a prosecution against Hunt for an unlawful assembly, in order to prove the reading of certain resolutions, a witness produced a copy of the resolutions which had been delivered to him by Hunt as the resolutions intended to be proposed, and proved that the resolutions he heard read corresponded with that copy; this *5] was held sufficient, though it was objected that the *original paper from which the resolutions were read ought to have been produced, or that a notice to produce it ought to have been given. *R. v. Hunt*, 3 B. & A. 568, 5 E. C. L. But this decision was expressly grounded, by Abbott, C. J., who delivered the judgment of the court, on the admission by the prisoner, by the delivery of the copy to the witness, that it contained a true statement of the resolutions passed at the meeting. In a prosecution on the Irish Convention Act, the indictment averred that divers persons assembled together, and intending to procure the appointment of a committee of persons, entered into certain resolutions respecting such committee, and charged the defendant with certain acts done for the purpose of assisting in forming that committee, and carrying the resolutions into effect. To show what was done at the meeting in question, a witness was called, who stated that, at a general meeting, the secretary proposed a resolution, which he read from a paper. The proposition was seconded, and the paper was handed to the chairman and read by him. It was objected that the absence of the paper should be accounted for, before parol evidence of the contents of it was received. But the majority of the court were of opinion that this was not a case to which the distinction between primary and secondary evidence was strictly applicable; that the proposed evidence was intended to show, not what the paper contained, but what one person proposed, and what the meeting adopted; in short, to prove the transactions and general conduct of the assembly; and that such evidence could not be rejected because some persons present took notes of what passed. *R. v. Sheridan*, 31 How. St. Tr. 672.¹

¹ See *Moor v. Greenfield*, 4 Me. 44. In order to prove that a certain ticket in a lottery had drawn a blank, a witness testified that he was a manager of the lottery, that he attended the drawing, and that a ticket with the combination numbers in question drew a blank. The testimony was objected to, because the appointment of a manager could be proved by the record, because the drawing of the lottery could be proved only by the manager's books, and because the result could not be ascertained without producing the scheme. It was held that the testimony was admissible. *Barnum v. Barnum*, 9 Conn. 242. The rule is, that secondary or inferior shall not be substituted for evidence of a higher nature which the case admits of. The reason of that rule is, that an attempt to substitute the inferior for the higher, implies that the higher could give a different aspect to the case of the party introducing the lesser. "The ground of the rule is a suspicion of fraud." But before the rule is applied, the nature of the case must be considered, to make a right application of it; and if it shall be seen that the fact to be proved is an act of the defendant, which from its nature can be concealed from all others except him whose co-operation was necessary before the act could be complete, then the admission and declarations of the defendant either in writing or to others in relation to the act become evidence. *United States v. Wood*, 14 Pet. 431. The rule requiring the production of the best evidence is applied to

Best evidence—handwriting. See also *post*, Documentary Evidence. In proving handwriting, the evidence of third persons is not inferior to that of the party himself. "Such evidence," says Mr. Phillipps, "is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true." 1 Phill. Ev. 212, 6th ed.¹ Nor do the slightness and infrequency of the opportunities which the witness has had of judging of the handwriting make any difference as to his competency. These are only matters of observation to the jury; as also is the fact that the witness has had no recent opportunities of forming a judgment. In *R. v. Horne Tooke*, 27 How. St. Tr. 71, the witness had not seen Mr. Tooke's handwriting for twenty years previous to the trial; and in *Lewis v. Sapio, Moo. & M.* 39, the witness had only seen the defendant write his surname.

If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow, that it is equally admissible for the purpose of *disproving* it, the question of *genuine* or not *genuine* being the same in both cases. Accordingly, although in an early case, where it was requisite to prove that certain alterations in a receipt were forged, it was held that the party who had written the receipt ought to be called as the best and most satisfactory evidence; *R. v. Smith, O. B.* 1768; 2 East, P. C. 1000; yet in subsequent cases *of prosecutions for forgery it has been held that the handwriting may be [*6 disproved by any person acquainted with the genuine handwriting. *R. v. Hughes*, 2 East, P. C. 1002; *R. v. M'Guire, Id.*; *R. v. Hurley*, 2 Moo. & Rob. 473; Case of Bank prosecutions, *R. & R.* 378.²

reject secondary evidence, which leaves that of a higher nature behind in the power of the party; it is not applied to reject one of several eye witnesses to the same transaction. *United States v. Gilbert*, 2 Sum. 19. The contents of letters which are lost may be shown by any one, without accounting for the non-production of the person to whom they were written. *Drisk v. Davenport*, 2 Stew. 286. S.

¹ *Conrad v. Farron*, 5 Watts, 536. S.

² It is not necessary to prove a bank note to be counterfeit by an officer of the bank. *Martin v. Commonwealth*, 2 Leigh. 745. So it is not necessary to prove property in stolen goods by the owner. *Lawrence v. State*, 4 Yerg. 145. See also *State v. Petty*, Harp. 59; *State v. Hooper*, 2 Bail. 27; *State v. Tutt, Id.* 44; *State v. Anderson, Id.* 565; *Hess v. State*, 5 Hammond, 5; *Foulkes v. Commonwealth*, 5 Robinson, 836. On an indictment for uttering a counterfeit bank bill, when the bank was out of the State, although within forty miles of the place of trial, the forgery was allowed to be proved by two witnesses who had very frequently received and paid out bills purporting to be made by such bank, and one of whom had once carried a large number of such bills to the bank, which were all paid as genuine, but neither of whom had ever seen the president or cashier write. *Commonwealth v. Carey*, 2 Pick. 47. S.

On a trial for forgery, where the defendant claimed that the signature charged as a forgery was in the handwriting of a daughter of one of the parties, the father cannot testify to prove the forgery in the absence of proof that the daughter cannot be called herself. *Haun v. State*, 13 Tex. App. 383.

In criminal cases the jury may form their opinion as to the genuineness of a document by a comparison of it with any other documents already in evidence before them, and shown to be the genuine production of the person whose handwriting is in question.

And now by the 28 Vict. c. 18, s. 8, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Best evidence—negative evidence of consent. In certain prosecutions it is necessary to prove that the act with which the prisoner is charged was done without the consent, or against the will, of some third person; and a question has been raised, whether the evidence of that person himself is not the best evidence for that purpose. Although at one time it appears to have been thought necessary to call the party himself, it is now settled that the want of consent may be proved in other ways. Where on an indictment under 6 Geo. 3, c. 36 (repealed), for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave any consent, and from all he had heard his master say (who had died before the trial, having given orders for apprehending the prisoners on suspicion), he believed that he never did: Bayley, J., left it to the jury to say, whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of night when the offence was committed, and to the circumstance of the prisoners running away when detected, as evidence to show that the consent required had not in fact been given. The prisoners were found guilty. *R. v. Hazy*, 2 C. & P. 458, 12 E. C. L. So on an indictment on 42 Geo. 3, c. 107, s. 1 (now repealed), for killing fallow-deer without consent of the owner, and on two other indictments, for taking fish out of a pond without consent, evidence was given that the offence was committed under such circumstances as to warrant the jury in finding non-consent; and the persons engaged in the management of the different properties were called, but not the owners. The judges held the convictions right. *R. v. Allen*, 1 Mood. C. C. 154.

Best evidence—persons acting in a public capacity. Where persons acting in a public capacity have been appointed by instruments in writing, those instruments are not considered the only evidence of the appointment, but it is sufficient to show that they have publicly acted in the capacity attributed to them. Thus in the case of all the peace officers, justices of the peace, constables, etc., it is sufficient to prove that they acted in those characters without producing their appointments; and this even in the case of murder. Per Buller, J., *Berryman v. Wise*, 4 T. R. 366; *R. v. Gordon*, 1789, cited *Id.*¹ So

¹ *Bassel v. Reed*, 2 O. 410. Thus also that the defendant was an innkeeper, though his license was on record. *Owings v. Wyant*, 1 H. & McH. 393. And oral proof of a

of a deputy county court judge. *R. v. Roberts*, 14 Cox, C. C. 101. So of a surrogate, on an indictment for perjury in the ecclesiastical court. *R. v. Verelst*, 3 Campb. 432. In *R. v. Cresswell*, *post*, p. 19, Lord *Coleridge said it "must be assumed that the clergyman performing the marriage service was not guilty of the grave offence [*7 ony, 6 & 7 Will. 4, c. 85, s. 7] of marrying persons in an unlicensed place." So where the directors and overseers of a parish were by a local act to sue and be sued in the name of their vestry clerk, it was held that proof of the latter having acted as vestry clerk was sufficient *prima facie* evidence of his being regularly appointed such clerk. *M'Gahey v. Alston*, 2 M. & W. 211. So of an attested soldier engaged in the recruiting service. *Walton v. Gavin*, 16 Q. B. 48, 71 E. C. L. And see the case of *R. v. Gordon*, 1 Leach, 515, *post*, p. 18. So of a commissioner for taking affidavits. *R. v. Howard*, 1 Moo. & Rob. 187. So of an attorney, though he may have once ceased to take out his certificate; it being presumed that he has been re-admitted. *Pierce v. Whale*, 5 B. & C. 68, 11 E. C. L. But in *R. v. Essex*, Dears. & B. C. C. 369, the prisoner, who was clerk to a savings bank, was convicted on an indictment charging him with embezzlement, the property being laid in A. B. The only evidence of A. B. being a trustee was his own statement that he had so acted, but that, before the commission of the offence, he had attended one meeting only. He was also manager of the bank, and it did not appear that any act had been done by him which was not consistent with his holding that office only. This was held on a case reserved to be insufficient.

Best evidence—admissions by party. Where a party is himself a defendant in a civil or criminal proceeding, and is charged as bearing some particular character, the fact of his having acted in that character will, in all cases, be sufficient evidence, as an admission that he bears that character, without reference to his appointment being in writing.¹ Thus in an action for penalties against a collector of taxes, under 43 Geo. 3, c. 99, s. 12 [repealed 43 & 44 Vict. c. 19, s. 4], the warrant of appointment was not produced, it being held that the act of collecting the taxes was sufficient to prove him to be collector. *Lister v. Priestly*, Wightw. 67. So on an information against an officer for receiving pay from government for a greater number of men than had mustered in his corps, Lord Ellenborough held, that the fact of his being commandant might be proved from the returns, in which he described himself as major commandant of the corps, without adducing direct evidence of his appointment by the king. *R. v. Gardner*, 2 Campb. 513. So in an action against a clergyman for non-residence, the acts of the defendant as parson, and his receipt of the emoluments of the church, will be evidence that he is parson without formal proof

clergyman's or magistrate's authority to marry is *prima facie* sufficient in a prosecution for bigamy. *Damon's Case*, 6 Greenl. 148. See *Dean v. Gridley*, 10 Wend. 254. S.

¹The authority of an agent to act for a corporation, need not be proved by record or a writing, but may be presumed from acts and the general course of business. *Warner v. The Ocean Insurance Co.*, 16 Me. 439. S.

of his title. *Bevan v. Williams*, 3 T. R. 635 (a); *Smith v. Taylor*, 1 Bos. & Pul. N. R. 210. Again, upon an indictment against a letter-carrier for embezzlement under 2 Will. 4, c. 4, proof that he acted as such was held to be sufficient, without showing his appointment. *R. v. Borrett*, 6 C. & P. 124, 25 E. C. L.

The rule by which the admissions of a party are treated as the best evidence against himself has been carried in civil cases to the extent of allowing even the contents of a written document, which are directly in issue, to be proved by such evidence, without in any way accounting for the non-production of the document itself. Whether at all, or how far, this rule is applicable to criminal cases, does not appear to have been much discussed.¹ There does not, on principle, seem any reason why the admissions of a prisoner should not be receivable in evidence as well when they relate to the contents of a written document, as when they amount to direct confessions of guilt. The rule is generally laid down in the broadest terms; *optimum habemus testem confitentem reum*. Everything which the prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as it may seem to them to deserve. 1 Russ. on Crimes, 318, n. 4th ed. The law, as applicable to civil cases, is laid down in *Slatterie v. Pooley*, 6 M. & W. 669. The reason, says Parke, B., in giving judgment, "why such statements or acts are admissible without notice to produce or accounting for the absence of the written instrument is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded, from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas, what a party himself admits to be true may reasonably be supposed to be so." See also *R. v. Walsh*, 1 Den. C. C. R. 199.²

¹ *Haynie v. State*, 2 Tex. App. 168. The recognizance of a defendant given before a justice cannot be put in evidence at the trial, inasmuch as it is an "admission obtained under compulsion." *Broyles v. State*, 64 Ind. 460; *People v. Willett*, 92 N. Y. 29; *S. C. 27 Hun. (N. Y.)*, 469; 1 N. Y. Crim. Rep. 355; see also, *Broyles v. State*, 47 Ind. 251. Where the statutes of a State require the justice of the peace to reduce to writing the voluntary confession of the accused, it is error on the trial to admit parol testimony of such statement. If the evidence shows that the statement was not reduced to writing or the writing cannot be admitted for irregularity, parol evidence can be given; where no such evidence can be given it is presumed the magistrate did his duty and parol evidence must be rejected. *Wright v. State*, 30 Miss. 332; *Cicero v. State*, 64 Ga. 156; *Woods v. State*, 63 Ind. 353. S.

² "It may be laid down, I think, as an undeniable proposition, that the admissions of a party are competent evidence against himself, only in cases when parol evidence would be admissible to establish the same facts, or in other words, when there is not in the judgment of the law, higher and better evidence in existence to be produced. It would be a dangerous innovation upon the rules of evidence, to give any greater effect to confessions or admissions of a party, unless in open court, and the tendency would be to dispense with the production of the most solemn documentary evidence." *Nelson, J., in Welland Canal Co. v. Hathaway*, 8 Wend. 486; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 328; *All Saints' Church v. Lovitt*, 1 Hall, 191; *Jenner v. Joliffe*, 6 Johns. 9; *Hasbrouck v. Baker*, 10 Id. 249. See *Day v. Seal*, 14 Id. 404. Even the admission under oath of the party who executed the instrument will not enable the court to dispense with the subscribing witness. *Kinney v. Flynn*, 2 R. L. 319. S.

Secondary evidence—lost documents. We have already seen that in certain cases secondary evidence of the contents of written documents is admissible. The most frequent case is that in which the document has been lost or destroyed. In order to lay the necessary foundation for the admission of secondary evidence in this case it must be shown that the document has once existed, and has either actually ceased to exist, or that all reasonable efforts have been made to find it and have failed.¹

The degree of diligence to be exercised in searching for a document will depend in a great measure on its importance. *Gully v. Bishop of Exeter*, 4 Bing. 298, 13 E. C. L.; *Gathercole v. Miall*, 15 M. & W. 319, 335. In the case of a useless document the presumption is that it is destroyed. Per Bayley, J., in *R. v. E. Farleigh*, 6 D. & R. 147, 16 E. C. L. And, where the loss or destruction of a paper is highly probable, very slight evidence is sufficient. Per Abbott, C. J., in *Brewster v. Sewell*, 3 B. & Ald. 296, 5 E. C. L. Thus where depositions have been delivered to the clerk of the peace or his deputy, and it appears that the practice is on a bill being thrown out, to put away the depositions as useless, slight evidence of search is sufficient, and the deputy need not be called, it being his duty to deliver the depositions to his

¹ When a witness refuses to produce a document after being served with a *subpoena duces tecum*, parol evidence is not admissible. *Richards v. Stewart*, 2 Day, 328; *Lynd v. Judd*, 3 Id. 499. It seems that there is no case where parol evidence has been admitted, merely because a paper is in the hands of a third person, and the court in their discretion have refused a *subpoena duces tecum*. *Gray v. Pentland*, 2 S. & R. 31. See *Deaton v. Hill*, Hayw. 73. A written contract deposited in the hands of a witness in a foreign State, by the parties, may be proved by the deposition of the depository, and need not be produced in court. *Baily v. Johnson*, 9 Cow. 115. An original paper in the hands of a person, who cannot be reached by the process of the court so as to compel its production, may be proved by parol. *Ralph v. Brown*, 3 W. & S. 395; [*State v. Gurnee*, 14 Kan. 111.] The admissions of a party proven by parol testimony, are not admissible to prove the contents of a deed or written instrument, without the absence of the instrument is accounted for by evidence of notice to produce it or its loss. The absence of the instrument in another State is not sufficient reason for admitting parol evidence of its contents. *Threadgill v. White*, 11 Ired. 591. But upon the preliminary question of the competency of a witness, parol evidence of an instrument is admissible without producing it or proving its loss. *Hays v. Richardson*, 1 G. & J. 366; *Stebbins et al. v. Sachet*, 5 Conn. 258; *Carmalt v. Platt*, 7 W. 318; *Hernden v. Givens*, 16 Ala. 262; *Den v. Achmore*, 2 Zab. 261; or to impeach his credit. *State v. Ridgely*, 2 H. & McH. 120; *Clark v. Hall*, 2 Id. 378. The existence and subsequent loss of an instrument must be first proved, before a copy thereof or parol evidence of its contents can be introduced. *Young v. Mackall*, 3 M. Ch. Dec. 393; *S. C.*, 4 Md. 362; *Dunnock v. Dunnock*, Id. 140; *Floyd v. Mintrey*, 5 Rich. 361; *Molineaux v. Collier*, 13 Ga. 406; *Perry v. Roberts*, 17 Mo. 36; *Millard v. Hall*, 24 Ala. 209. [Of Telegrams, see *Smith v. Easton*, 54 Md. 138.] The amount of evidence required to prove the loss of a written instrument, for the purpose of admitting secondary evidence of its contents, depends, in a great measure, upon the nature of the instrument and the circumstances of the case. *Waller v. School District*, 22 Conn. 326; *Harper v. Scott*, 12 Ga. 125; *Meek v. Spencer*, 8 Ind. 118. [Secondary evidence of the contents of a letter which plaintiff mailed, but which defendant denied having received, when there is evidence that defendant came to inquire about the claim concerning which the letter was written, is rightly admitted. *Augur v. Whittier*, 117 Mass. 451.] The law requires *bona fide* and diligent search for the paper alleged to be lost, in the place where it is most likely to be found: *Glenn v. Rogers*, 3 Md. 312; [*Taylor v. Clark*, 49 Cal. 671;] mere notice to produce is not enough to justify the adverse party in introducing a paper in evidence. *State v. Wisdom*, 8 Port. 511. Notice to produce a notice is not requisite to let in evidence of its contents. *Atwell v. Grant*, 11 Md. 101. S.

principal. *Freeman v. Ashell*, 2 B. & C. 494, 9 E. C. L. See *Boyle v. Wiseman*, 10 Ex. 647.¹

¹ *United States v. Reyburn*, 6 Pet. 352; *Minor v. Tillotson*, 7 Id. 99; *Cary v. Campbell*, 10 Johns. 363; *Pendleton v. Commonwealth*, 4 Leigh, 694; *Van Dusen v. Frink*, 15 Pick. 449; *Braintree v. Battles*, 6 Vt. 395; *Bennet v. Robinson*, 3 Stew. 227. Except when the paper has been wantonly destroyed by the party himself. *Price v. Tallman*, 1 Cox, 447; *Broadwell v. Riles*, 3 Hals. 275; or he has had it in his power to supply the loss. *McCalley v. Franklin*, 2 Y. 340. Loss must be shown. *Sterling v. Potts*, 2 Southard, 773; *Boynnton v. Rees*, 8 Pick. 329; *Bozerth v. Davidson*, 2 Penn. 617; *Dawson v. Graves*, 4 Call, 127; *United States v. Porter*, 3 Day, 283; *Cauffman v. The Congregation*, 6 Bin. 59; *Andrews v. Hooper*, 13 Mass. 472; *Taunton Bank v. Richardson*, 5 Pick. 436; *Mitchell v. Mitchell*, 3 Stew. & P. 81; *Boothe v. Dorsey*, 11 G. & J. 247; *Parks v. Dunkle*, 3 W. & S. 291; [*Brashears v. State*, 58 Md. 563; *Frazee v. State*, 58 Ind. 8; *Sager v. State*, 11 Tex. App. 110; *Caldwell v. State*, 63 Ind. 283.] The party himself is competent to prove the loss to let in secondary evidence. *Chamberlain v. Gorham*, 20 Johns. 144; *Blanton v. Miller*, 1 Hayw. 4; *Donelson v. Taylor*, 8 Pick. 390; *Jackson v. Johns*, 5 Cow. 74; *Jackson v. Betts*, 6 Id. 377; 9 Id. 208; *Grimes v. Talbot*, 1 Marsh. 205; *Shrawsders v. Harper*, 1 Harring. 444; *Hamit v. Lawrence*, 2 A. K. Marsh. 366; *Bass v. Brooks*, 1 Stew. 44; *McNeil v. McClintock*, 5 N. H. 355; *Adams v. Leland*, 7 Pick. 62; *Ward v. Ross*, 1 Stew. 136; *Davis v. Spooner*, 3 Pick. 284; *Patterson v. Winne*, 5 Pet. 233; *Porter v. Ferguson*, 4 Fla. 102; *Wade v. Wade*, 12 Ill. 89; *Pharis v. Lambert*, 1 Sneed, 228; *Glassell v. Mason*, 32 Ala. 719. *Contra Sims v. Sims*, 2 Rep. Const. Ct. 225: its previous existence having been first proved *aliunde*. *Mecker et al. v. Jackson*, 3 Y. 442. He is sworn specially in such cases to make answer. *Jackson v. Packhurst*, 4 Wend. 309. The evidence of loss is addressed to the court alone. *Jackson v. Brier*, 16 Johns. 193; *Page v. Page*, 15 Pick. 368; *Witter v. Latham*, 12 Conn. 392. The instrument must be proved to have been duly executed. *Kimball v. Morrell*, 4 Greenl. 368; *McPherson v. Rathbone*, 2 Wend. 216; *Jackson v. Vail*, Id. 175; [*People v. Hunt*, 49 Cal. 653; *Hampshire v. Floyd*, 39 Tex. 103.] A party to a cause is a competent witness to prove the loss or destruction of an original paper, in order to the introduction of collateral evidence of its contents. The affidavit of the party is a mode proper to be adopted for the introduction of the evidence of the party to the cause of the loss of an original paper, and upon other collateral questions such affidavit should exclude all presumption that the party may have the paper in his own possession. *Woods v. Gasatt*, 11 N. H. 442. See *Colman v. Walcott*, 4 Day, 388. When one party to a suit is sworn to prove the loss of a written instrument with a view to secondary evidence, though the adverse party may be examined to disprove the loss and account for the instrument, yet he cannot, under the color of this right, give testimony denying directly or indirectly the former existence of the instrument, or the matters designed to be evinced by it. The party affirming the loss cannot be sworn, until after the former existence of the instrument has been established by independent evidence; and when sworn, his testimony, as well as that of his adversary, is, in general, to be confined to the single question of loss. *Woodworth v. Barker*, 1 Hill, 171. It is not, however, a universal and inflexible rule that a plaintiff must himself make oath to the loss of a paper, of which he is presumed to have the custody, and of diligent search for it, before he can introduce secondary evidence of its contents. *Foster v. Mackay*, 7 Metc. 531. Presumptive evidence of the loss is not enough. *Taunton Bank v. Richardson*, 5 Pick. 436; *Jackson v. Woolsey*, 11 Johns. 446; *Patterson v. Winne et al.*, 5 Pet. 233; S. C., 9 Id. 633; *Jackson v. Root*, 18 Johns. 60; *Central Turnpike v. Valentine*, 10 Pick. 142; *Bouldin v. Massie*, 7 Wheat. 122; *Jackson v. Mely*, 10 Johns. 374. A deposition should not be rejected because the witness speaks of papers not produced, if it appear that the papers are such as would not probably be preserved for so great a length of time, and are not in the possession or in the power of the witness or the party who offers the deposition. *Tilghman v. Fisher*, 9 W. 441. Proof that a ship's papers were seized with her, and delivered to the court by which she was condemned, but that a certain paper belonging to her could not be found there, on search, is sufficient evidence of loss to warrant parol evidence of its contents. *Francis v. Ocean Ins. Co.*, 6 Cow. 404; *Braintree v. Battles*, 6 Vt. 395. *Ex parte* affidavits of witnesses are not admissible to prove the loss or contents of a written instrument. *Viles v. Moulton*, 13 Vt. 510. It is enough to show reasonable diligence. *Minor v. Tillotson*, 7 Pet. 99. When proof by a witness that he assisted the plaintiff in searching among his papers is not sufficient, see *Sims v. Sims*, 2 Rep. Const. Ct.

Where it is the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. *R. v. Stourbridge*, 8 B. & C. 96, 15 E. C. L. And where an attorney or officer is applied to generally for documents, the court will assume, until the contrary is proved, that all the documents relating to the subject of inquiry are produced. *M'Gahey v. Alston*, 2 M. & W. 213. But where an attorney was applied to for a document which related to his own private affairs, and by his direction a search was made in his office, and the document was not found, the Court of Queen's Bench refused to say that the court of quarter sessions was wrong in deciding that there had not been a sufficient search for the purpose of rendering secondary evidence admissible. *R. v. Saffron Hill*, 1 E. & B. 93, 72 E. C. L.; 22 L. J., M. C. 22.

It is not necessary in every case to call the person to whose custody the document is traced. *R. v. Saffron Hill*, *ubi supra*. But some *doubt seems to have existed whether, if he be not called, evidence can be given of answers made by him to inquiries respecting the document. Such evidence appears to have been received in *R. v. Morton*, 4 M. & S. 48, 30 E. C. L., but was rejected in *R. v. Denio*, 7 B. & C. 620, 14 E. C. L. In *R. v. Kenilworth*, 7 Q. B. 642, 53 E. C. L., the court seems to incline to the opinion that for this preliminary purpose such evidence ought to be received; in *R. v. Saffron Hill*, 1 E. & B. 93, 72 E. C. L., evidence of this kind

225. Evidence which leaves the mind in doubt whether success would not have attended a further search will not do. *Studdart v. Vestry*, 2 G. & J. 227. A search for a lost paper made more than a year before the trial, is not sufficient to justify the introduction of secondary evidence of the paper. *Porter v. Wilson*, 13 Pa. 641. See further as to what is reasonable diligence. *Fletcher v. Jackson*, 23 Vt. 581; *Hall v. Van Wyck*, 10 Barb. 376; *Meakim v. Anderson*, 11 Id. 215. If an instrument be lost to the party in consequence of an irregular or defective transmission by mail, it will let in secondary evidence. *U. S. Bank v. Sill*, 5 Conn. 106; [*Augur v. Whittier*, 117 Mass. 451.] See *Thalhimer v. Brinckerhoff*, 6 Cow. 90. Secondary evidence of the contents of a written instrument is admissible when it has been destroyed voluntarily, through mistake or by accident. *Riggs v. Taylor*, 9 Wheat. 483; *Bank of Kentucky v. McWilliams*, 2 J. J. Marsh. 256; *Kennedy v. Fowke*, 5 H. & J. 63; *McDowell v. Hall*, 2 Bibb, 610; *Maxwell v. Light*, 1 Call, 117; *Fouax v. Fouax*, 1 Pennington, 166; *Brown v. Littlefield*, 7 Wend. 454.

In order to admit secondary evidence as to the contents of a lost paper, it must appear that all the search reasonably practicable has been made to find the paper alleged to be lost. *Holbrook v. School Trustees*, 28 Ill. 187. If a person is deprived by fraud of the possession of written instruments which belong to him, secondary evidence of their contents is admissible. *Grimes v. Kimball*, 3 Allen, 518. One who has voluntarily and deliberately destroyed a written document cannot be permitted to testify to its contents, without evidence to rebut the presumption of fraud. *Joannes v. Bennett*, 5 Allen, 169.

Copies of letters written by the seconds engaged in a duel, may be introduced when it is shown that the originals were last seen in the possession of an officer of the United States Army, absent on duty. *Moody v. Commonwealth*, 4 Metc. 1. 8.

On proof of the destruction of the original an uncertified copy of a telegram was held to be admissible. *State v. Hopkins*, 50 Vt. 316. On a trial for perjury, the contents of the declaration in the suit in which the perjury is alleged to have been committed may be proved, when the declaration is proved to have been filed and it cannot be found. *Gordon v. State*, 48 N. J. Law, 611. Where the question is whether a girl is a minor testimony as to her size and general development will not be received, to prove her age where that is susceptible of direct proof. *State v. Griffith*, 67 Mo. 287.

had been received, but as the court thought that, even if receivable, it was insufficient for the purpose, the point remained undecided. However, in *R. v. Braintree*, 28 L. J., M. C. 1, the Court of Queen's Bench thought that answers to such inquiries were admissible to satisfy the conscience of the court that the search had been a reasonable one.

Secondary evidence—documents in the hands of adverse party.

In the case where a document is in the hands of an adverse party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received. Its object is not, as was formerly thought, to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it if he likes at the trial, and thus to secure the best evidence of its contents. *Dwyer v. Collins*, 7 Ex. R. 639. There is no distinction between civil and criminal cases with regard to the production of documents after notice given to produce them, and with regard to the admissibility of secondary evidence in case of their non-production. *R. v. Le Marchand*, coram Eyre, B., 1 Leach, 300 (n). In *R. v. Laver*, for high treason, it was proved by a witness, that the prisoner had shown him a paper partly doubled up, which contained the treasonable matter, and then immediately put it into his pocket; and no objection was made to the witness giving parol evidence of the paper. 6 State Trials, 229 (fo. ed.); 16 Howell's St. Tr. 170, S. C.; *R. v. Francia*, 15 Howell's St. Tr. 941.

But where it was proved that a ring which had been lost had an inscription upon it, and that the prisoner had been seen with a ring like the one which had been lost and with an inscription upon it, the counsel for the crown was not permitted to ask what was the inscription upon the ring seen in the prisoner's possession, no notice to produce the ring having been given to the prisoner. *R. v. Farr*, 4 F. & F. 336. See *R. v. Francis*, *ante*, p. 2.

A notice to produce will let in secondary evidence in criminal as well as civil cases, where the document to be produced appears to have been in the hands of the agent or servant of the prisoner under such circumstances, as that it might be presumed to have come to his own hands. Colonel Gordon was indicted for the murder of Lieut.-Colonel Thomas in a duel. The letter from Gordon containing the challenge was carried by Gordon's servant, and delivered to Thomas's servant, who brought a letter in answer and delivered it to Gordon's servant; but it did not appear in fact, that the letter was ever delivered to Gordon himself. Baron Eyre permitted an attested copy of the latter letter to be read against the prisoner, and left it to the jury as evidence, if they were of opinion that the original had ever reached the prisoner's hands. *Hotham, B.*, concurred; but *Gould, J.*, thought that positive evidence ought to be given that the original had come to the prisoner's hands. *R. v. Gordon*, O. B. 1784; 1 Leach, 300 (n). Though the evidence was rightly received *there

*10] seems to be an error in leaving the preliminary question of fact

to the jury; all such questions are for the court alone. See *Boyle v. Wiseman*, *infra*, p. 13. Where a prisoner's attorney produced a deed as part of the evidence of his client's title upon the trial of an ejectment, in which the prisoner was lessor of the plaintiff, and the deed was delivered back to the attorney when the trial was over, it was held to be in the prisoner's possession, and the prisoner not producing it in pursuance of notice, secondary evidence of its contents was received. Per Vaughn, B., *R. v. Hunter*, 4 C. & P. 128, 19 E. C. L. But in order to render a notice to produce available, the original instrument must be shown to be in the possession of the opposite party, or of some person in privity with him, who is bound to give up possession of it to him. Therefore, where a document is in the hands of a person as a stakeholder between the defendant and a third party, a notice to produce will not let in secondary evidence of its contents, *Parry v. May*, 1 Moo. & R. 279. See also *Laxton v. Reynolds*, 18 Jur. 963, Exch.

Secondary evidence—notice to produce—when dispensed with.

Where from the nature of the prosecution the prisoner must be aware that he is charged with the possession of the document in question, a notice to produce it is unnecessary.¹ Thus, upon an indictment for stealing a bill of exchange, parol evidence of its contents may be given, without any proof of a notice to produce. *R. v. Aickles*, 1 Leach, 294; 2 East, P. C. 675. So upon the trial of an indictment for administering an unlawful oath, it may be proved by parol that the prisoner read the oath from a paper, although no notice to produce that paper has been given. *R. v. Moor*, 6 East, 419 (n). See, also, *R. v. Farr*, *supra*, p. 2, where the prisoner must have known that he was charged with the possession of the ring, although this point does not appear to have been taken.

But an indictment for setting fire to a dwelling-house, with intent to defraud an insurance office, is not such a notice to the prisoner as will dispense with a notice to produce the policy of insurance, so as to allow the prosecutor to give secondary evidence of its contents. *R. v. Ellicombe*, 5 C. & P. 522, 24 E. C. L.; 1 Moo. & R. 260; *R. v. Kitson*, 1

¹ The rule that a party cannot give secondary evidence of the contents of papers in the possession of the other party, unless he has given reasonable notice for the production of the papers at the trial, does not apply to cases in which the opposite party must know from the nature of the suit or prosecution, that he is charged with the fraudulent possession of the papers. *State v. Mayberry*, 48 Me. 218; *Commonwealth v. Messenger et al.*, 1 Bin. 273; *People v. Halbrooke*, 13 Johns. 90. Or when the party has fraudulently obtained possession, or has it in court. *Pickering v. Meyers*, 2 Bail. 113. [A notary may testify to the contents of the notice of protest sent by him to the endorser, though the latter has not been notified to produce such notice at the trial. *Brooks v. Blaney*, 62 Me. 456.] If the plaintiff is deprived of the instrument on which the action is brought by a fraudulent and forcible act of the defendant, the plaintiff may give secondary evidence of its contents, and he is not obliged to notify the defendant to produce it. *Gray v. Kernahan*, 2 Rep. Const. Ct. 65. On a trial for forgery it is competent to prove by the party attempted to be defrauded, without notice to produce papers, that the defendant had previously brought to him the draft of an instrument which he saw and read, but never executed, and which was different from the deed afterwards brought to him as the same, and as such executed by him. *State v. Shurtliff*, 18 Me. 368. S.

Dears, C. C. R. 187; 22 L. J. M. C. 118. Upon an indictment for perjury it was held that secondary evidence of a draft last seen in the possession of the prisoner was inadmissible, no notice to produce having been given and the indictment not operating as a notice. It must be observed, however, that the course which the evidence took at the trial was such, that a great deal turned on the contents of the draft, and on alterations alleged to have been made in it, and it would appear that this circumstance was regarded by several of the judges as of great importance. *Reg. v. Elworthy*, L. R., 1 C. C. R. 103; 37 L. J., M. C. 3.

A notice to produce is not requisite where the document tendered in evidence is a duplicate original; per Lord Ellenborough, *Philpson v. Chace*, 2 Campb. 110; per Bayley, J., *Colling v. Treweek*, 6 B. & C. 394, 13 E. C. L.; or a counter part; *Burleigh v. Stibbs*, 5 T. R. 465; *Roed. West v. Davis*, 7 East, 353; *Mayor of Carlisle v. Blamire*, 8 East, 487. Or where the instrument to be given in proof is a notice, as a notice of action; *Jory v. Orchard*, 2 B. & P. 39; a notice of the dishonor of a bill of exchange; *Keene v. Beaumont*, 2 B. & P. 288; or a notice to quit; 2 B. & P. 41.¹ Nor is a notice to produce necessary where *11] the party has fraudulently or forcibly obtained possession of the document, as from a witness in fraud of his *subpoena duces tecum*. *Goodered v. Armour*, 3 Q. B. 956, 43 E. C. L.²

It is sufficient to dispense with a notice to produce, that the party in possession of the document has it with him in court. *Dwyer v. Collins*, 7 Ex. R. 639, overruling *Bate v. Kinsey*, 1 Cr. M. & R. 38.

Secondary evidence—notice to produce—form of. It is not necessary that a notice to produce shall be in writing; and if a notice by parol and in writing be given at the same time, it is sufficient to prove the parol notice alone. *Smith v. Young*, 1 Campb. 440; 3

¹ Where a copy of a paper is delivered to a party, and the original of the same is kept by the person delivering the copy, the original cannot be read in evidence to affect the party to whom the copy is delivered, with a knowledge of its contents, without notice being first given to the latter to produce such copy, and a sufficient ground being laid for the admission of a copy in evidence. *Commonwealth v. Parker*, 2 Cush. 212. Parol evidence may be given of the contents of a paper not produced or accounted for, if the object is not to prove the facts which the writing would prove, but only something collateral, as its identity with or difference from another writing. *West v. State*, 2 Zab. 212.

² When there was evidence sufficient to warrant the belief that the person or agent of whom the defendant claimed had got possession of a bill of sale, from himself to the plaintiff, and fled the country with it, it was held that further proof of search, or of notice to the defendant to produce it, was unnecessary. Every presumption is to be made *in odium spoliatoris*. *Cheatham v. Riddle*, 8 Tex. 162. Secondary evidence of the contents of a writing, which is in the possession of a third person residing out of the jurisdiction of the court, and which cannot be presumed to be in the possession of the opposite party, is admissible without giving previous notice to said party to produce the original. *Shepherd v. Giddings*, 22 Conn. 282. Parol evidence is admissible to show the contents of a paper beyond the jurisdiction of the court. *Brown v. Wood*, 19 Mo. 475. The naked fact of voluntary destruction, without explanation, of a paper, is held such presumptive evidence of fraudulent design as to preclude all secondary evidence. *Bayley v. McMickle*, 9 Cal. 430. S.

Russell, 340, 5th ed. Nor is a notice to produce necessary if the document be known and can be proved to be not in existence. *R. v. Haworth*, 4 C. & P. 254, 19 E. C. L.; *R. v. Spragge*, cited in *How v. Hall*, 14 East, 276 (n.). But it is better, and it is the universal practice, to give the notice in writing. No particular form of notice is requisite if it sufficiently appear what the document is which is required to be produced, and when and where that is to be done. *Lawrence v. Clark*, 14 M. & W. 251. Where under a notice to produce "all letters, papers, or documents touching or concerning the bill of exchange mentioned in the declaration," the party served was called upon to produce a particular letter, *Best, C. J.*, was of opinion that the notice was too vague, and that it ought to have pointed out the particular letter required. *France v. Lucy, Ry. & Moo.* N. P. C. 341; see also *Jones v. Edwards*, M'Cl. & Y. 149. But a notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action," *Jacob v. Lee*, 2 Moo. & R. 33, or "all letters written to and received by plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them, and all papers, etc., relating to the subject-matter of this cause," *Morris v. Hanson*, 2 Moo. & R. 392, has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. And see *Rogers v. Custance*, 2 Moo. & R. 179.

Secondary evidence—notice to produce—to whom and when.

In criminal as well as in civil cases it is sufficient to serve the notice to produce, either upon the defendant or prisoner himself, or upon his attorney. *Cates, q. t. v. Winter*, 3 T. R. 306; *M'Nally on Ev.* 355; 2 T. R. 203 (n.); 3 Russell, Cri. 342, 5th ed. And it may be left with a servant of the party at his dwelling-house. Per *Best, C. J.*, *Evans v. Sweet*, R. & M. 83. It must be served within a reasonable time, but what shall be deemed a reasonable time must depend upon the circumstances of each particular case. The prisoner was indicted for arson. The commission day was the 15th of March, and the trial came on upon the 20th. Notice to produce a policy of insurance was served on the prisoner in gaol upon the 18th of March. His residence was ten miles from the assize town. It being objected that this notice was too late, *Littledale, J.*, after consulting *Parke, J.*, said, "We are of opinion that the notice was too late. It cannot be presumed that the prisoner had the policy with him when in custody, and the trial might have come on at an earlier period of the assize. We therefore think that secondary evidence of the policy cannot be received." *R. v. Ellicombe*, 5 C. & P. 522, 24 E. C. L.; 1 Moo. & R. 260; *S. C. R. v. Haworth*, 4 C. & P. 254, 19 E. C. L., S. P. So where the notice to produce a policy of insurance was given to the prisoner in the middle of the *day [*12 preceding the trial, the prisoner's residence being thirty miles from the assize town, it was held to be too late. *R. v. Kitson*, *Dears. C. C. R.* 187; 22 L. J., M. C. 118. Notice served on the attorney at his office on the evening before the trial, at half-past seven, was held by *Lord Denman, C. J.*, to be insufficient to let in secondary evidence

of a letter in his client's possession. *Byrne v. Harvey*, 2 Moo. & R. 89; and see also *Lawrence v. Clark*, 14 M. & W. 250.

In *R. v. Barker*, 1 F. & F. 326, a notice to produce policies of insurance served on the prisoner's attorney on Tuesday evening, the policies being then twenty miles off, and the trial taking place on the Thursday, was held sufficient, it being shown that there was an opportunity of procuring the policies, if the prisoner had chosen to do so.¹

Service of a notice on a Sunday is bad. Per *Patterson, J.*, in *Hughes v. Budd*, 8 Dowl. P. C. 315.

Secondary evidence—consequences of notice to produce. The only consequence of giving a notice to produce is that it entitles the party giving it, after proof that the document in question is in the hands of the party to whom it is given, or of his agent, to go into secondary evidence of its contents, but does not authorize any inference against the party failing to produce it. *Cooper v. Gibbons*, 3 Campb. 363. It would seem, however, that the refusing to produce is matter of observation to the jury. *Semb. per Lyndhurst, C. B.*, 4 Tyrwh. 662; 1 Cr. M. & R. 41.² But see *Doe v. Whitehead*, 8 A. & E. 571, 35 E. C. L.

If a party to the suit refuses to produce a document when called on, he cannot afterwards produce it as his own evidence: *Laxton v. Reynolds*, 18 Jur. 963, Ex.; and if the defendant refuses to produce a document, and the plaintiff is thereby compelled to give secondary evidence of its contents, the defendant cannot afterwards produce it as part of his own case, in order to contradict the secondary evidence. *Doe v. Hodgson*, 12 Ad. & E. 135, 40 E. C. L. If he calls for papers, and inspects them, they will be rendered evidence for the opposite party. *Wharam v. Routledge*, 5 Esp. 235; *Wilson v. Bowie*, 1 C. & P. 10, 12 E. C. L.³ Though it is otherwise, if he merely calls for

¹ A notice given at the bar during the progress of a trial to produce a paper, is not sufficient unless it appears satisfactorily that the paper is in court at the time, and in possession of the party upon whom demand is made, or if elsewhere, that it could be easy of access. *Atwell v. Miller*, 6 Md. 10; *Barker v. Barker*, 14 Wis. 131. Notice a few minutes before is not enough unless the paper is in court. *McPherson v. Rathbone*, 7 Wend. 216. See *Pickering v. Meyers*, 2 Bail. 113.

What notice sufficient, see *Bogart v. Brown*, 5 Pick. 18; *Bemis v. Charles*, 1 Met. 440. When a paper is in possession of the attorney of the party, he should have notice to produce it, and not a *subpoena duces tecum*. *McPherson v. Rathbone*, 7 Wend. 216. A paper being traced into the possession of a prisoner in close custody, notice to produce it was served on him four days before the day of trial; his residence being four and a half miles distant, held that the notice was sufficient to authorize the admission of secondary proof. *State v. Hester*, 2 Jones, N. C. 83. S.

² Every intendment is to be made against a party to whose possession a paper is traced, and who does not produce it on notice. *Life & Fire Co. v. Mechanics' Co.*, 7 Wend. 31. But the party is permitted to purge himself on oath from the possession. *Vasse v. Mifflin*, 4 Wash. C. C. 519. S.

³ If a book or document be called for by a notice to produce it, and it be produced, the mere notice does not make it evidence; but if the party giving the notice takes and inspects it, he takes it as testimony to be used by either party if material to the issue. *Penobscot Boom Corporation v. Lamson*, 16 Me. 224. A paper produced on notice must be proved, unless he who produces it is a party to it or claims a beneficial

them without inspecting them. *Sayer v. Kitchen*, 1 Esp. 210. Secondary evidence of papers cannot be given until the party calling for them has opened his case, before which time there can be no cross-examination as to the contents. *Graham v. Dyster*, 2 Stark. N. P. 23, 3 E. C. L. As against a party who refuses, on notice, to produce a document, it will be presumed that it bore the requisite stamp, but the party refusing is at liberty to prove the contrary. *Crisp v. Anderson*, 1 Stark. N. P. 35, 2 E. C. L.; *Closmadeue v. Carrell*, 18 Com. B. 36, 86 E. C. L.

Secondary evidence—privileged communications. The grounds upon which a party can withhold a document which he acknowledges to possess, and which he is called upon to produce, will be stated hereafter in treating of privileged communications in general. It has been held, that it is the party who seeks to give secondary evidence who must satisfy the court that the witness refuses to produce the deed, and is justified in doing so. The party in possession of the document must, therefore, be served with a *subpoena duces tecum* in the ordinary way, and he must appear in court and claim his privilege. If the privilege be claimed by the witness on behalf of himself, the question, whether or not he is entitled to it, will be *decided on his evidence only; but, if the privilege be claimed [*13 by a witness on behalf of another person, as by an attorney on behalf of his client, it may be necessary to call that person; as, if he were present, he might waive his privilege. But, in the case of an attorney, his assertion, that in withholding the document he is acting by his client's direction, will generally be sufficient. *Tayl. Ev.* 407; *Doe d. Gilbert v. Ross*, 7 M. & W. 102; *Newton v. Chaplin*, 10 C. B. 356, 70 E. C. L.; *Phelps v. Prew*, 3 E. & B. 430, 77 E. C. L. See further *post*, tit. Privilege of Witness.

Secondary evidence—physical inconvenience. The nature of the obstacles which render it impossible, or highly inconvenient, to produce a document on physical grounds must be proved in the usual way. This being done to the satisfaction of the court, secondary evidence of the contents will be admitted. Thus, where in an indictment for unlawfully assembling, the question was, what were the devices and inscriptions on certain banners carried at a public meeting, it was held that parol evidence of the inscriptions was admissible; *R. v. Hunt*, 3 B. & C. 566, 10 E. C. L. So the inscriptions on a monument may be proved by parol; *Doe v. Cole*, 6 C. & P. 359, 25 E. C. L. But where a notice was suspended by a nail to the wall of an office, it was held that it must be produced; *Jones v. Tarleton*, 9 M. & W. 675.

interest under it. *Lessee of Rhoads v. Selin*, 4 Wash. C. C. 710. Proof of the handwriting of the signature to a lost instrument, when the knowledge of the witness as to that handwriting has been acquired since he saw the instrument, must be of the most positive and unequivocal kind; such as seeing the party write or acknowledge his signature. *Porter v. Wilson*, 13 Pa. 641; *Stone v. Thomas*, 12 Id. 209. Witnesses to prove the contents of a lost instrument may state the substance thereof without giving the exact words. *Commonwealth v. Roark*, 8 Cush. 210. S.

Secondary evidence may be given of tablets let into walls; or where the original is in a foreign country and cannot be removed. *Alivon v. Furnival*, 1 C. M. & R. 277; see *Boyle v. Wiseman*, 10 Ex. R. 647.¹

Secondary evidence—public documents. It is not laid down what are public documents; but as in all other cases, it is the party who seeks to give secondary evidence of the document, who must satisfy the court that the document is of a public nature, within the meaning of the rule. Many documents of this kind will be found mentioned in the chapter on Documentary Evidence. It is to be observed, that there is in this case this peculiarity, that a particular kind of evidence is required by the law to be substituted for the original, and no other evidence of contents of public documents is admissible. What this evidence is will be found in the chapter already alluded to.²

Secondary evidence—duty of judge. The preliminary question of fact upon which the admissibility of the evidence depends, is for the decision of the judge, not of the jury.³ And in order to decide this question, he must receive all the evidence which is tendered by either party upon the point, if such evidence is otherwise proper. Therefore, where a party who had made a *prima facie* case for the reception of secondary evidence of a document, proceeded to prove its contents by the parol evidence of a witness who had seen the original, on which the opposite party interposed, and showing a document to the witness, asked him if that was the original, which the witness denied; it was held that the judge was bound to decide the collateral question, whether the document thus offered was the original or not, and reject or receive the secondary evidence accordingly. *Boyle v. Wiseman*, 1 Jur. N. S. 894.

As to degrees of secondary evidence. In *Brown v. Woodman*, 6 C. & P. 206, 25 E. C. L., it was said by Parke, J., that there are no degrees of secondary evidence; and he held that a defendant *14] might give parol *evidence of the contents of a letter, of which he had kept a copy, and that he was not bound to produce the copy. So where two parts of an agreement were prepared, but one only was stamped, which was in the custody of the defendant, who, on notice, refused to produce it, the court ruled that the plaintiff might give the draft in evidence, without putting in the part of the agreement which was unstamped. *Gamons v. Swift*, 1 Taunt. 507. This principle

¹ Wherever evidence of the condition of clothes or other articles of personal property is material, it may be given by witnesses without producing the things themselves. *Commonwealth v. Pope*, 103 Mass. 440. 8.

² The contents of a judicial record which has been lost may be proved by parol, the same as any other writing. A copy is not required. *Bridges v. Thomas*, 50 Ga. 378.

³ It will not do to admit improper evidence, and then leave the question of its pertinency to the jury. That is to submit a question of law to the jury. *People v. Ivey*, 49 Cal. 56.

was distinctly affirmed in *Doe v. Ross*, 7 M. & W. 102, and in *Hall v. Ball*, 3 M. & Gr. 242, 42 E. C. L. The only exception is where, as in the case of public documents, some particular species of evidence has been specially substituted for the original. But, even in this case, if good reason can be shown, why neither the original evidence nor the substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible. *Taylor Ev.* 459; *Thornton v. Shetford*, 1 Falk. 284; *M'Dougall v. Gowry*, Ry. & M. 392; *Anon.*, 1 Vent. 257.¹

It is hardly necessary to say that, even if secondary evidence be admissible, a copy of a document is, in itself, no evidence of the contents of the original; and it can only become so when verified by the oath of a witness. *Fisher v. Samuda*, 1 Camp. 190; *Tayl. Ev.* 460. Still less is a copy of a copy any evidence of the contents of the original. *Evringham v. Roundhill*, 2 Moo. & Ry. 138; *Zielman v. Pooley*, 1 Stark. N. P. 168, 2 E. C. L. But it might become so, if in addition to being itself verified, the copy from which it was taken was verified also.

¹ Proof of the contents of a lost paper should be the best the party has in his power to produce, and at all events such as to leave no reasonable doubt as to the substantial parts of the paper. *Renner v. Bank of Columbia*, 9 Wheat. 581. If, in an indictment for forgery, the instrument be destroyed or suppressed by the prisoner, the tenor may be proved by parol evidence. The next best evidence is the rule; therefore, if there be a copy which can be sworn to, that is the next best evidence. *United States v. Britton*, 2 Mas. 464. Copies of deeds made by disinterested persons, of good character, and under circumstances that create no imputation of fraud, may be received in evidence when the original is proved to be lost. *Allen v. Parish*, 3 Hammond, 107. Due notice having been given to produce a letter, written by one party to another, and the latter not producing it, the former proved by his clerk that he copied the letter in a letter book, and that it was his invariable custom to carry letters thus copied to the post-office, and seldom handed them back; but could not recollect that he sent this particular letter: held sufficient evidence of sending the letter, and that a copy was admissible evidence. *Thelhimer v. Brinckerhoff*, 6 Cow. 90; *United States v. Gilbert*, 2 Sumner, 81. A letter-press copy, made at the time of writing the original paper, cannot be read in evidence as an original. *Chapin v. Siger*, 4 McL. 378. Evidence of the contents of a letter written by the plaintiffs to the defendant is not admissible, where it appeared that the plaintiffs had in their possession a *fac-simile* of the original which they failed to produce. *Stevenson v. Hoy*, 43 Pa. 191. S.

*15]

*PRESUMPTIONS.

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General nature of presumptive evidence. No subject of criminal law has been more frequently or more amply discussed than that of presumptive evidence, and no subject can be more important; the nature of the presumptions made in criminal cases being the feature of English law which distinguishes it most strongly from all the continental systems. It is not possible to discuss in this place, at any length, the principles of evidence, but it is necessary to point out what is the general nature of presumptive evidence. "A presumption of any fact is properly an inference of that fact from other facts that are known: it is an act of reasoning." Per Abbott, C. J., *Rex v. Burdett*, 4 B. & Ald. 95 at p. 161, 6 E. C. L. When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such fact, and they are called *presumptions* and not *proofs*; for they stand instead of the proofs of the fact until the contrary be proved. Gilb. Ev. 157¹. The instance selected by Chief Baron Gilbert to illustrate the nature of presumption is, where a man is discovered suddenly dead in a room, and another is found running out in haste with a bloody sword; that is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants of such facts; and the next proof to the sight of the fact itself is the proof of those circumstances that usually attend such fact. *Id.*

It is evident that, in every trial, numberless presumptions must be made by the jury; many so obvious that we are hardly aware that they are necessary, and these present no difficulty; but with regard to others, great care and caution is necessary in making them, and it is

¹ Wheel. C. C. 132, a; *Id.* 100. Presumptions are allowed when the facts to be presumed are consistent with the duty, trust or power authorized, and tend to subserve the purposes of justice; but when the act would be unauthorized by the trust or office, or are contrary to the duty of the party assuming the power, no such presumption can be admitted. *Rowan v. Lamb*, 4 Greene, 468. S.

for this reason that there are certain practical rules which it is always desirable to observe on this subject.¹

There are indeed some presumptions which, as the phrase is, the *law itself makes; that is, the law forbids, under certain circum- [*16 stances and for certain purposes, any other than one inference to be drawn, whether that inference be true or false. There are but few such presumptions in criminal cases, and those few mostly in favor of the prisoner. Where presumptions against the prisoner have been imperatively directed by the law, the rule has generally been looked on with disfavor; as, for instance, the presumptions required by the 21 Jac. 1, c. 27, that a woman delivered of a bastard child, who should endeavor to conceal its birth, should be deemed guilty of murder. This odious statute was repealed by 43 Geo. 3, c. 58, s. 3.

These two kinds of presumptions are generally distinguished as presumptions of law and presumptions of fact, respectively. With regard to presumptions of law there is not much difficulty, the circumstances under which they arise being generally pretty clearly defined.² It is not so, however, with regard to presumptions of fact, there being frequently the difficulty not only of deciding whether a particular presumption ought to be made at all, but which of several presumptions arising out of the same state of facts is the right one.

The difference between the rules as to presumptions in civil and criminal cases seems to arise from this: that in civil cases it is always necessary for a jury to decide the question at issue between the parties, and, whatever be their decision, the rights of the parties will accordingly be affected; however much, therefore, they may be perplexed, they cannot escape from giving a verdict founded upon one view or the other of the conflicting facts before them; presumptions, therefore, are necessarily made on comparatively weak grounds. But in criminal cases, there is always a result open to the jury, which is practically looked upon as merely negative, namely, that which declares the accused to be *not guilty* of the crime with which he is charged. In cases of doubt it is to this view that juries are taught to lean. 1 Phil. Ev. 456, 10th ed.; M'Nally, Ev. p. 578. Great caution is doubtless nec-

¹ It is no presumption against a defendant to a criminal charge that he does not produce as a witness a person having a knowledge of material facts, where the evidence is equally accessible to the prosecution. *State v. Rosier*, 55 Ia. 517. Presumption is not proof, and is, therefore, not a legitimate foundation for a second presumption; but where the first presumption is only confirmatory of what has been proved, it may be invoked in support of the second presumption. *Morris v. Indianapolis & St. Louis R. R. Co.*, 10 Bradw. (Ill.) 389.

² In the absence of proof to the contrary, the common law of another State will be presumed to be the same as that of the tribunal of trial. *Cheff v. Mut. Benefit Life Ins. Co.*, 13 Allen (Mass.) 308; *Cox v. Morrow*, 14 Ark. 603; *Holmes v. Broughton*, 10 Wend. 75; *Bundy v. Hart*, 46 Mo. 463; *Reese v. Harria*, 27 Ala. 301; *Crake v. Crake*, 13 Ind. 166; *Hill v. Grigsby*, 32 Cal. 55; *Walsh v. Dart*, 12 Wis. 635; *Bramhall v. Van Campen*, 8 Minn. 13; *Green v. Rugely*, 23 Tex. 530; *Lucas v. Ladew*, 28 Mo. 342; *Meyer v. McCabe*, 73 Mo. 236. Compare *Rowlands v. Manley*, 80 Ind. 185. But there is no such presumption as to statute law. *Cutter v. Wright*, 22 N. Y. 472; *Smith v. Whittaker*, 23 Ill. 367. It is not necessary to prove that whiskey is an intoxicating liquor; of such things the courts take judicial notice. *Egan v. State*, 53 Ind. 162. Where a statute makes an act unlawful, without a license, the presumption is against the defendant, unless he produces his license. *State v. Higgins*, 13 R. I. 330.

essary in all cases of presumptive evidence; and, accordingly, Lord Hale has laid down two rules with regard to the acting upon such evidence in criminal cases. "I would never," he says, "convict any person of stealing the goods of a certain person unknown, merely because he could not give an account how he came by them, unless there was due proof made that a felony was committed of these goods." And again, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or, at least, the body found dead." 2 Hale, 290. So it is said by Sir William Blackstone, 4 Comm. 359, that all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. The following case on this subject was cited by Garrow, *arguendo* in *R. v. Hindmarsh*, 2 Leach, 571. The mother and reputed father of a bastard child were observed to take it to the margin of the dock in Liverpool, and after stripping it, to throw it into the dock. The body of the infant was not afterwards seen, but as the tide of the sea flowed and reflowed into and out of the dock, the learned judge who tried the father and mother for the murder of their child observed that it was possible the tide might have carried out the living infant, and the prisoners were acquitted.

"With respect to the comparative weight due to direct and presumptive evidence, it has been said that circumstances are in many *17] cases of greater force and more to be depended on than the testimony of living witnesses; inasmuch as witnesses may either be mistaken themselves, or wickedly intend to deceive others; whereas circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie. Per Mountenoy, B., *Annesley v. Lord Anglesea*, 9 St. Tr. 426; 17 Howell, St. Tr. 1430. It may be observed, that it is generally the property of circumstantial evidence to bring a more extensive assemblage of facts under the cognizance of a jury, and to require a greater number of witnesses, than where the evidence is direct, whereby such circumstantial evidence is more capable of being disproved if untrue. See Bentham's *Rationale of Judicial Evidence*, vol. 3, p. 251. On the other hand, it may be observed, that circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences. Not unfrequently a presumption is formed from circumstances which would not have existed as a ground of crimination, but for the accusation itself; such are the conduct, demeanor, and expressions of a suspected person, when scrutinized by those who suspect him. And it may be observed, that circumstantial evidence, which must in general be submitted to a court of justice through the means of witnesses, is capable of being perverted in like manner as direct evidence, and that, moreover, it is subjected to this additional infirmity, that it is composed of inferences each of which may be fallacious." *Phill. Ev.* 468, 10th ed.¹

¹ As to circumstantial evidence, see *McCann v. State*, 13 Sm. & Mar. 147; *State v. Roe*, 12 Vt. 93; *People v. Videto*, 1 Parker C. R. 603; *Ripley v. Miller*, 1 Jones' Law,

General instances of presumption. As almost every fact is capable of being proved by presumptive as well as by positive evidence, it

479; *Moore v. Ohio*, 2 O. St. 500. [*State v. Norwood*, 74 N. C. 247; *Reardon v. State*, 4 Tex. App. 602.] Even in the case of a capital offence it is not necessary that the evidence should produce an absolute certainty upon the minds of the jury. *Sumner v. State*, 5 Blackf. 579. [It is not error for the court to instruct the jury that there is no inherent difference between direct and circumstantial evidence, when properly qualified by an explanation of the force of such evidence. *People v. Morrow*, 60 Cal. 142.] If it is apparent that the accused is so situated that he could give evidence of all the facts and circumstances as they existed, and he fails to offer such proof, the natural conclusion is that if produced instead of rebutting it would sustain the charge. *Com. v. Webster*, 5 Cush. 295; *People v. McWhorter*, 4 Barb. 433. [But this presumption will not arise where the evidence is equally accessible to the prosecution. *State v. Rosier*, 55 Ia. 517. Nor where the witness who is not called is an alleged accomplice. *State v. Cousins*, 58 Ia. 250.] When the evidence is circumstantial only, the jury, in order to convict, must find the circumstances to be clearly proved as facts, and must also find that those facts clearly and unequivocally imply the guilt of the prisoner, and that they cannot be reasonably reconciled with any hypothesis of his innocence. *United States v. Douglass*, 2 Blatch. 207. [*Walbridge v. State*, 13 Neb. 236; *Williams v. State*, 41 Tex. 209; *Barnes v. State*, Id. 342; *Beavers v. State*, 58 Ind. 530.] The true test as to whether evidence amounts to proof in criminal cases is, whether the circumstances proved produce moral conviction, to the exclusion of every reasonable doubt; and if this result is caused by the evidence, it can make no difference whether the testimony that leads to it is positive or circumstantial. *Mickle v. State*, 27 Ala. 20. [*Faulk v. State*, 52 Ala. 415. But the doubt must be a reasonable one. The jury should not indulge in the supposition of facts not proven. *Ray v. State*, 50 Ala. 104; *Cohen v. State*, Id. 108; *People v. Ashe*, 44 Cal. 238; *People v. Brannon*, 47 Cal. 96; *White v. State*, 36 Tex. 347; *Earle v. People*, 73 Ill. 329. A speculative doubt is not a reasonable doubt. *Kennedy v. State*, 107 Ind. 144.] In the application of circumstantial evidence, the utmost caution should be used. It is always insufficient, when assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true. *Algheri v. State*, 25 Miss. 584; *Ripley v. Miller*, 1 Jones, N. C. 479. [*State v. Nelson*, 11 Nev. 334; *Johnson v. Commons*, 29 Gratt. (Va.) 796. But this is not so where the evidence is not circumstantial, but direct; *Cone v. State*, 13 Tex. App. 483; or where it is the intent only which is proved by circumstantial evidence. *State v. Maxwell*, 42 Ia. 208; *cf. Black v. State*, 1 Tex. App. 368; *Cohen v. State*, 32 Ark. 226.] In a case of circumstantial evidence, the fact that the accused was of a peaceful temper and habits was held to be admissible. *Carrol v. State*, 3 Humph. 315.

In all cases of circumstantial evidence the rule is now established by a great preponderance of authority to be necessary, not only that the circumstances shall all concur to show that the prisoner committed the crime, but that they all are inconsistent with any other rational conclusion. *Horne v. State*, 1 Kan. 42; *People v. Shuler*, 28 Cal. 490; *State v. Johnson*, 19 Ia. 230; *State v. Collins*, 20 Id. 85; *People v. Strong*, 30 Cal. 151; *Orr v. State*, 34 Ga. 342; *Joe v. State*, 38 Ala. 422; *People v. Dick*, 32 Cal. 213; *Turbeville v. State*, 40 Ala. 715; *James v. State*, 45 Miss. 572; *Schusler v. State*, 29 Md. 394; *Martin v. State*, 38 Ga. 293; *Commonwealth v. Annis*, 15 Gray, 197. See *State v. Coleman*, 22 La. An. 455; *People v. Phipps*, 39 Cal. 326; *Pitts v. State*, 43 Miss. 472; *State v. Van Winkle*, 6 Nev. 340. [*State v. Willingham*, 33 La. An. 537.]

Wherever a reasonable doubt exists of the prisoner's guilt in any case the jury should acquit. *State v. Ostrander*, 18 Ia. 435; *Elven v. State*, 30 Ga. 869; *State v. Rorabacher*, 19 Ia. 154; *Arnold v. State*, 23 Ind. 170; *Mose v. State*, 36 Ala. 311; *People v. Lackanais*, 32 Cal. 433; *People v. William*, Id. 280; *State v. Daley*, 41 Vt. 564; *Clark v. State*, 37 Ga. 91; *Connor v. State*, 34 Tex. 659; *Dorsey v. State*, Id. 651; *Lowder v. Commonwealth*, 8 Bush. 432; *Commonwealth v. Cunningham*, 104 Mass. 545; *Bradley v. State*, 31 Md. 492; *Commonwealth v. Carey*, 2 Brews. 404; *Commonwealth v. Drum*, 58 Pa. 9; *Long v. State*, 38 Ga. 491; *Sparks v. Commonwealth*, 3 Bush. 111; *Moorer v. State*, 44 Ala. 15; *State v. Van Winkle*, 6 Nev. 340; *Reins v. People*, 30 Ill. 256; [*Castle v. State*, 75 Ind. 146; *People v. Brown*, 59 Cal. 345; *Hardeman v. State*, 12 Tex. App. 350; *Green v. State*, 12 Tex. App. 51]; and this rule applies in the prisoner's favor even as to substantive matters of defence, such as insanity, or alibi, etc., set up by him. *Adams v. State*, 42 Ind. 373; *Pollard v. State*,

would be impossible to enumerate the various cases in which the former evidence has been admitted. It may be useful, however, to state some

53 Miss. 410; *People v. Pearsall*, 50 Mich. 233; *Hoge v. People*, 117 Ill. 35. The doctrine of reasonable doubt applies only to criminative and not to exculpatory facts. *Dyson v. State*, 13 Tex. App. 402.] If his evidence raises a reasonable doubt, he is entitled to the benefit of it. *State v. McGluer*, 5 Nev. 132; *State v. Ellick*, 1 Win. 56; *Chappel v. State*, 7 Cold. 92; *Boswell v. Commonwealth*, 20 Grati. 860; *State v. Hundley*, 46 Mo. 414; *People v. Schryver*, 42 N. Y. 1; *Chase v. People*, 40 Ill. 352; *State v. Klinger*, 43 Mo. 127; *State v. Felter*, 32 Ia. 49; *McKensie v. State*, 42 Ga. 334; *Bradley v. State*, 31 Ind. 492; *McFarland's Case*, 8 Abb. Pr. N. S. 57, 93: but see as to doubt of sanity, *Kriel v. Commonwealth*, 5 Bush, 362. S.

On insanity, see *People v. Wilson*, 49 Cal. 13; *State v. Bruce*, 48 Ia. 530; *Dacey v. People*, 116 Ill. 555. It is error to refuse to instruct the jury that the defendant is presumed to be innocent. *Line v. State*, 51 Ind. 172. On the other hand, falsehoods uttered by the prisoner when satisfactorily proved are circumstantial evidence to establish his guilt. *State v. Benner*, 64 Me. 267. Where the defence is an alibi, proved by two witnesses who were contradicted by a boy, that the jury gave credence to the boy is not ground to set aside the verdict. *Rogers v. People*, 98 Ill. 581. To sustain an alibi the evidence therefor must reasonably exclude the possibility of presence. *Johnson v. State*, 59 Ga. 142; *State v. Fenlason*, 78 Me. 495. To establish an alibi it is not necessary that the jury should be fully satisfied of its truth. *State v. Henry*, 48 Ia. 403; *State v. Northrup*, 48 Ia. 583; *Howard v. State*, 50 Ind. 190; *State v. Jaynes*, 78 N. C. 504; *State v. Hardin*, 46 Ia. 623; *State v. Watson*, 7 S. C. 63; *Staman v. State*, 14 Neb. 68. It is sufficient if it raises a reasonable doubt. *McAnally v. State*, 74 Ala. 9; *Johnson v. State*, 21 Tex. App. 368. While failure to prove an alibi raises no presumption against the prisoner, detection of a fraudulent attempt to establish a fictitious alibi may have such an effect. *Porter v. State*, 55 Ala. 95; *Turner v. Commonwealth*, 86 Pa. 54; *Pilger v. Commonwealth*, 18 W. N. C. (Pa.) 136; S. C., 1 Pa. Sup. Ct. Dig. 65. Evidence to prove an alibi should be received with great caution, but the defence if established is equal to any other. *Provo v. State*, 55 Ala. 222. Where the defence is an alibi, the burden of proof is on the defendant. *State v. Hamilton*, 57 Ia. 596; *State v. Krewsen*, Id. 588; *State v. Bruce*, 48 Ia. 530; *State v. Reed*, 62 Ia. 40; *State v. Hemrick*, 62 Ia. 414; *State v. Fry*, 67 Ia. 475. So also of insanity. *Bond v. State*, 23 Ohio St. 349. Where the court has instructed the jury generally on the subject of reasonable doubt, it is not error to refuse to charge specially on the evidence which may raise the doubt. *Gibbs v. State*, 1 Tex. App. 12; *People v. Cruger*, 4 N. Y. Crim. Rep. 60. Where the defence of an alibi is set up, and the prosecution puts in evidence which contradicts this defence, if the jury prefer to believe the witnesses for the prosecution, the weight of the evidence is for them, and their verdict will not be set aside. *Doyle v. State*, 5 Tex. App. 442. An unsuccessful attempt to prove an alibi is not conclusive. *Kilgore v. State*, 74 Ala. 1; *Porter v. State*, 55 Ala. 95.

A failure to establish an alibi is not conclusive against the prisoner. *State v. Collins*, 20 Ia. 85; it raises no presumption against him. *Toler v. State*, 16 O. St. 583. S. *Turner v. Commonwealth*, 86 Pa. 54.

It is erroneous to charge "that he who is to pass on the question is not at liberty to disbelieve as a juror, while he believes as a man." *State v. Collins*, 20 Ia. 85; *State v. Pratt*, Id. 267. [See *Munden v. State*, 37 Tex. 353; *Williams v. State*, Id. 474.] On a criminal trial, if the commonwealth fails to make out a *prima facie* case, the fact that the defendant produces no evidence to negative an averment which the government is bound to prove, will not warrant the jury in finding that such averment is proved. *Commonwealth v. Hardiman*, 9 Gray, 136. [Nor is the fact that defendant has made no defence in his preliminary examination before the magistrate admissible against him. *Templeton v. People*, 27 Mich. 501.] Wherever in criminal cases the examination of the evidence given upon a challenge leaves a reasonable doubt of the impartiality of a juror, the defendant should have the benefit of the doubt, and the juror be excluded. *Holt v. People*, 13 Mich. 224. In an action on a statute to recover treble value of goods feloniously taken, it was held to be erroneous to instruct the jury that the plaintiff was bound to prove the felonious taking beyond a reasonable doubt, in the same manner as in a criminal prosecution. *Manson v. Atwood*, 30 Conn. 102. S.

Evidence is to be deemed beyond reasonable doubt when it is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act without hesitation in their own most important concerns. *Houser v. State*, 58 Ga. 78; *Jarrell v. State*, 58 Ind. 293; *State v. Hayden*, 45 Ia. 11; *Smith v. People*, 74 Ill.

particular instances of presumptive proof which may occur in the course of criminal proceedings.

Proof of the possession of land, or the receipt of rent, is *prima facie* evidence of seisin in fee. Co. Litt. 15, a; B. N. P. 103.¹ So possession is presumptive evidence of property in chattels. A deed or other writing thirty years old is presumed to have been duly executed, provided some account be given of the place where found, etc., B. N. P. 255. The license of a lord to inclose waste may be presumed after twelve or fourteen years' possession, the steward of the lord having been cognizant of it. Doe v. Wilson, 11 East, 56; Bridges v. Blanchard, 1 A. & E. 536, 28 E. C. L. The flowing of the tide is presumptive evidence of a public navigable river, the weight of such evidence depending upon the nature and situation of the channel, Miles v. Rose, 5 Taunt.

144; Turner v. State, 4 Lea (Tenn.) 206; Garfield v. State, 74 Ind. 60; or when it is such as honest, conscientious men may entertain on the state of facts presented. People v. Stott, 4 N. Y. Crim. Rep. 306. A charge to the jury that a reasonable doubt is such as "arises fairly and naturally in the mind of the whole jury" is erroneous. State v. Sloan, 55 Ia. 217. It is error to refuse to charge that "a probability of defendant's innocence is a just foundation for his acquittal." Bain v. State, 74 Ala. 38. It is erroneous to charge the jury that "when the evidence is such that a man would act upon it in his own affairs of great importance, there is no reasonable doubt within the meaning of the law." People v. Ah Sing, 51 Cal. 372. The error of the court in refusing to charge that the jury must acquit where there is a reasonable doubt, is not cured by a general charge on presumption of innocence. Snyder v. State, 59 Ind. 105. The jury, when unable to reconcile a conflict of testimony, may give credit to that which they deem the best. Taylor v. State, 5 Tex. App. 1; Brady v. State, Id. 343; Templeton v. State, Id. 398; Johnson v. State, Id. 423. Where a statute requires the testimony of at least two witnesses, or the equivalent thereto, it is sufficient if the evidence as a whole is equivalent to two witnesses, each important fact need not be so proved. State v. Smith, 49 Conn. 376. Where the evidence is wholly circumstantial, each fact in the chain must be proved by the same weight of evidence as if it were the main fact in issue. Harrison v. State, 6 Tex. App. 42. Circumstantial evidence may be used to prove incidental facts in the chain as well as the main issue. State v. Reno, 67 Ia. 587. The fact that a crime has been committed may be proved by circumstantial evidence. State v. Winner, 17 Kan. 298. The burden of establishing the guilt of the accused is never shifted from the State. State v. Wingo, 68 Mo. 181; Jones v. State, 13 Tex. App. 1; Taylor v. State, Id. 184; Turner v. Commonwealth, 86 Pa. St. 54. But where a defence is set up, such as irresponsible drunkenness, the burden of proof is on the defendant, and it must be shown by a fair preponderance of evidence. State v. Grear, 29 Minn. 24; People v. Bell, 49 Cal. 486. So also of insanity. State v. Geddis, 42 Ia. 264. It is error if the court instruct the jury that the evidence must be *clearly* preponderating. Coyle v. Commonwealth, 100 Pa. 573. The burden is on the defendant to show facts of alleviation, such as would reduce his offence to the crime of manslaughter. Commonwealth v. Bush, 2 Pa. Sup. Ct. Dig. 61. Wherever any evidence is part of the proper case of the prosecution, the burden of proof is upon the State. There can be no presumption from a failure of the defendant to produce such evidence, even when in his own hands. State v. Wilbourne, 87 N. C. 529; People v. Sweeny, 4 N. Y. Crim. Rep. 275. The weight of circumstantial evidence is for the jury. And it is not error to admit evidence that defendant was seen in possession of a horse shortly after a larceny, without fully identifying the horse as the one stolen. State v. Ingram, 16 Kan. 14. Blood stains, or what appear to be such, may be proved as tending to the identification of specific articles. Commonwealth v. Tolliver, 119 Mass. 312. See also Commonwealth v. Watson, 109 Mass. 354. Where on a trial for theft the State has produced evidence of peculiar footprints from place of theft to defendant's house, the prisoner may show that he had not worn nor possessed such a boot. Stone v. State, 12 Tex. App. 219. On the presumption, in larceny, arising from the free use of money. State v. Grebe, 17 Kan. 458.

¹ People v. Reed, 11 Wend. 158. S.

705, 1 E. C. L. ; 1 Marsh, 813 ; R. v. Montague, 4 B. & C. 602, 10 E. C. L. The existence of an immemorial custom may be presumed from an uncontradicted usage of twenty years. R. v. Joliffe, 2 B. & C. 54, 9 E. C. L. ; 3 D. & R. 240. So the continuance of things *in statu quo* will be generally presumed ; as where the plaintiff being slandered in his official character proves his appointment to the office before the libel, his continuance in office at the time of the libel need not be proved though averred.¹ R. v. Budd, 5 Esp. 229. So the law presumes that a party intended that which is the immediate or probable consequence of his act. R. v. Dixon, 3 M. & S. 11, 15.²

So a letter is presumed as against the writer, to have been written *18] *upon the day on which it bears date ; Hunt v. Massey, 5 B. & Ad. 902, 27 E. C. L. ; 3 Nev. & M. 109 ; and whether written by a party to the suit or not ; Poter v. Glossop, 2 Ex. R. 191 ; and a bill is presumed to be made on the day it is dated ; Owen v. Waters, 2 M. & W. 91 ; except when used to prove a petitioning creditor's debt ; Anderson v. Weston, 6 Bing. N. C. 296, 301, 37 E. C. L. So the presumption is that indorsements on a note admitting the receipt of interest were written at the time of their date. Smith v. Battens, 1 Moo. & R. 341. Indeed it is a general presumption that all documents were made on the day they bear date. Davies v. Lowndes, 7 Scott, N. R. 141 ; Poter v. Glossop, 2 Ex. 191.

Presumption of innocence and legality. The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption. In other words, a man cannot be presumed to have committed a crime without some evidence of it. But any evidence, however small, if it be such that a reasonable man might fairly be convinced by it, is sufficient for the purpose.³

Presumption against immorality. There is also a general presumption against immoral conduct of every description. Thus legitimacy is always presumed ; Banbury Peerage Case, 1 Sim. & S. 153 ; and cohabitation is generally presumptive proof of marriage : Doe d.

¹ A state of relations between parties once shown to exist, is presumed to continue until a change is proved to have occurred. Eames v. Eames, 41 N. H. 177. S. So also a reputation for veracity. Lum v. State, 11 Tex. App. 483.

² A person is presumed to intend the ordinary consequences of his acts ; and the burden of proof is upon a person charged with crime to rebut this presumption by evidence of a different intent. People v. Orcutt, 1 Park. Cr. R. 252. S. State v. Heaton, 77 N. C. 505.

It is error if the judge so words his charge as to mislead the jury on this point. Anderson v. State, 41 Wis. 430.

³ In a criminal case, the establishment of a *prima facie* case only does not take away the presumption of the defendant's innocence, nor shift the burden of proof: Ogletree v. State, 28 Ala. 693 ; People v. Milgate, 5 Cal. 127. [State v. Banks, 43 Ia. 595. Presumption of innocence is inapplicable in civil cases. McDeed v. McDeed, 67 Ill. 545.] The killing being proved, the law implies malice, and it devolves on the defendant to repel the presumption. People v. Marsh, 6 Cal. 543 ; People v. Stonecipher, Id. 405. See Gray v. Gardiner, 3 Mass. 399. As to when the law will presume malice. See Head v. State, 44 Miss. 731 ; Evans v. State, Id. 762 ; Murphy v. People, 37 Ill. 447 ; State v. Bonds, 2 Nev. 265. S. State v. Goodenow, 65 Me. 30.

Fleming v. Fleming, 4 Bing. 266, 13 E. C. L. ; except in cases of bigamy. So it will not be presumed that a trespass or other wrong has been committed; *Best. Ev.* 416; and there is always a presumption in favor of the truth of testimony. *Id.* 419. Where a woman, whose husband twelve months previously had left the country, married again, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the duration of life. *R. v. Inhab. of Twynning*, 2 B. & A. 386. But the observations of Bayley, J., and Best, J., in *R. v. Twynning*, with respect to conflicting presumptions, were questioned by the court in *R. v. Harborne*, 2 Ad. & E. 544, 29 E. C. L. ; where it was decided that the court of quarter sessions were right in presuming that the first wife was living, although such presumption led to the conclusion that the husband had been guilty of bigamy. The court put the case of a man being shown to be alive a few hours before the second marriage, as one in which the presumption that he was alive at the time of the second marriage would clearly be made. And it is to be observed, that the circumstances of the two cases differed so much as fully to justify the court of quarter sessions in coming to opposite conclusions upon them. It has now been decided that no presumption arises that the party is alive, but that it is a question for the jury. See *R. v. Lumley*, L. R. 1 C. C. R. 196; see *post*, tit. "Bigamy." See upon the point of conflicting presumptions, *Middleton v. Barned*, 4 Ex. 241.

Presumption *omnia rite esse acta*. This well-known presumption is of very common application. Upon this principle it is presumed that all persons assuming to act in a public capacity have been duly appointed. Thus in *R. v. Gordon*, Leach's Cr. Ca. 515, on an indictment for the murder of a constable in the execution of his office, it was held to be not necessary to produce his appointment; and that it was sufficient if it was proved that he was known to act as constable. The same presumption applies in favor of the due discharge of official and public duties, and see *R. v. Cresswell*, 1 Q. B. D. 446; 43 L. J. M. C. 77; 13 Cox, C. C. R. 127, *post*, tit. "Bigamy," where it was presumed that a clergyman rightly performed a marriage ceremony.¹ *R. v. Roberts*, 14 Cox, C. C. 101, where it was held that a deputy county court judge acting as such was evidence of his being duly appointed. *R. v. Stewart*, 13 Cox, C. C. 296, where it was presumed that a consul at New York had taken proper steps with regard to the transmission of witnesses.

¹ *Dean v. Gridley*, 10 Wend. 254; *Bryden v. Taylor*, 2 H. & J. 396. So the presumption is that an officer has done his duty. *Winlow v. Beall*, 6 Call, 44. In favor of the acts of public officers the law will presume all to have been rightly done, unless the circumstances of the case overturn the presumption. *Ward v. Barrows*, 2 O. 241. The presumption is that the committing magistrate did his duty in reducing the examination to writing, until the contrary is proved. *Davis v. State*, 17 Ala. 415; *State v. Eaton*, 3 Harring. 554; *State v. Parrish*, Busb. Rep. 239; *Peter v. State*, 4 Sm. & Marsh. 31. S.

The records of a district court showing forfeiture of bail are conclusive in an action against the surety to recover on his bond. *State v. Bryant*, 55 Ia. 451. In an application to reduce bail or to discharge an order of arrest, unless the facts on which the

Presumptions from the course of nature. It is a presumption of law that males under fourteen are incapable of sexual intercourse. So it is a presumption of fact that the period of gestation in woman is about nine calendar months. The exact limits of this period are, both legally and scientifically, very unsettled; and if there were any circumstances from which an unusually long or short period of gestation might be inferred, or if it were necessary to ascertain the period with any nicety, it would be desirable to have special medical testimony upon the subject. The subject was elaborately discussed in the Gardiner Peerage case, and the scientific evidence given in that case will be found in the report of it by Le Marchant. For ordinary purposes, however, it will be a safe presumption that fruitful intercourse and parturition are separated by a period not varying more than a week either way from that above mentioned.

There is no presumption of law that life will not continue for any period however long, but juries are justified in presuming, as a fact, that a person is dead who has not been heard of for seven years: *Hopewell v. De Pinna*, 2 Campb. 113; this is in analogy to the period fixed by the 1 Jac. 1, c. 11, s. 2 (see now 24 & 25 Vict. c. 100, s. 57), which absolves a husband or wife from the penalties of the crime of bigamy¹ after an absence of seven years.¹

Presumption of guilt arising from the conduct of the party charged. In almost every criminal case a portion of the evidence laid before the jury consists of the conduct of the party, either before or after being charged with the offence, presented not as part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind. The probative force of such testimony has been elaborately, carefully, and popularly considered by Bentham, in his *Rationale of Judicial Evidence*, ch. 4. In weighing the effect of such evidence nothing more than ordinary caution is required. The best rule is for the jury order was granted are denied they will be presumed to be true. *People v. Tweed*, 5 Hun, (N. Y.) 382.

¹ *Miller et al. v. Beater*, 3 S. & R. 490; *King v. Paddock*, 18 Johns. 141; *Wambaugh v. Scharck*, 1 Penn. 229; *Innis et al. v. Campbell et al.*, 1 R. 373; *Crouch et ux. v. Eveleth*, 15 Mass. 305; *Battin's Lessee v. Bigelow*, Pet. C. C. 452. When a person has been absent seven years from the place of his domicile, his death is presumed to have taken place at some time within the seven years, and not in all cases at the expiration of that period. *State v. Moore*, 11 Ired. 160. When a party has been absent from his place of residence for more than seven years, and has not been heard from during that period, and is afterwards seen in his own State, hearsay evidence of the fact is not admissible, but the person who saw him should be brought to testify to the fact. *Smothers v. Mudd*, 9 B. Mon. 490. The presumption in law, of a person's death, arises only after a seven years' absence, without intelligence, though a jury may find it under circumstances, from a shorter time. *Puchett v. State*, 1 Sneed, 355; *Stevens v. Macnamara*, 36 Me. 176; *Rice v. Lumley*, 10 O. St. 596. There is no positive rule as to when the presumption of death arises. *Merritt v. Thompson*, 1 Hilt. (N. Y.) 550. The presumption of death which arises at the expiration of seven years cannot operate retrospectively. *Clarke's Exrs. v. Canfield*, 2 McCar. 119. When the presumption of a continuation of life conflicts with that of another person's innocence of a criminal offence, the latter will prevail. *Sharp v. Johnson*, 22 Ark. 79. The presumption of death after an absence of more than seven years is applicable only to one who has left his home or place of residence. *Commonwealth v. Thompson*, 11 Allen, 23. S.

to apply honestly their experience and to draw such inferences as experience indicates in matters of the gravest importance. This will, in general, be found a safer guide than a consideration of some of the extreme cases which are related in many of the books on evidence. These must be considered as somewhat exceptional, and it may be fairly said that this is a very useful kind of evidence, and one which no judge need seek to withdraw from the consideration of a jury.¹

¹Offer to bribe the officer and attempt to escape are admissible. *Devan v. Commonwealth*, 4 Gratt. 541; *Whaley v. State*, 11 Ga. 123; *Fanning v. State*, 14 Mo. 386. [*Waite v. State*, 13 Tex. App. 169; *Burris v. State*, 38 Ark. 221; *State v. Williams*, 54 Mo. 170. But see *State v. Williams*, 43 Tex. 182; *Cordova v. State*, 6 Tex. App. 207.] It is competent to show that the defendant advised an accomplice to escape. *People v. Rathbone*, 21 Wend. 509. [The appearance bond and its forfeiture are proper evidence to go to the jury, as evidence of concealment, flight, etc. *State v. Wingfield*, 34 La. An. 1200.] Evidence that the defendant in an indictment refused to fly, when advised to do so, after suspicions against him were excited, is inadmissible in defence. *Commonwealth v. Hershey*, 2 Allen, 173. [*Williams v. State*, 52 Ala. 411. He cannot account for his flight until it is proved by the prosecution. *State v. Hays*, 23 Mo. 287. Accompanying declarations only, not subsequent ones, are admissible to explain it away. *Chamblee v. State*, 78 Ala. 466. In a clear case he cannot complain that his explanation is excluded. *People v. Ah Choy*, 1 Idaho, 317. Where the State introduces evidence that the wife of defendant said he was not in the house, when he was, it must also be shown that the defendant heard the conversation. *Clark v. State*, 78 Ala. 474.] "Flight may be very strong evidence of guilt, or it may weigh nothing, according to the circumstances under which it takes place. The legal presumption from flight is against the prisoner, and it lies upon him to rebut it." *Fox, J., Chapman's Trial*, pamph. p. 213. [*State v. Beatty*, 30 La. An. Pt. II, 1266; *Batten v. State*, 80 Ind. 394.] It is of no weight as a presumption where the killing is not denied, and, therefore, it is not ground for a reversal in such a case that evidence to explain the flight was excluded. *State v. Milton*, 37 La. An. 77. Evidence of flight is always admissible. *People v. Ogle*, 4 N. Y. Crim. Rep. 349.] Evidence tending to show a defendant's concealment of himself in fear of arrest is admissible. *People v. Pitcher*, 15 Mich. 377. [*People v. Lockwing*, 61 Cal. 380; *Barron v. People*, 73 Ill. 256. The rule extends only to the person fleeing, and the flight of one or two conspirators cannot be put in evidence against the other on a separate trial. *People v. Stanley*, 47 Cal. 113. Evidence why defendant in a criminal case broke jail is admissible. *State v. Mallon*, 75 Mo. 355. So the requisition of the governor of another State is admissible to show how he was arrested. *Bowles v. State*, 58 Ala. 335.] To rebut the presumption of guilt arising from the flight and concealment of those charged with the crime, evidence that such concealment and flight was caused by apprehension of violence is admissible. *Plummer v. Commonwealth*, 1 Buch. 76. Evidence that one on trial for murder, tried to break jail and was recaptured is admissible. *Hittner v. State*, 19 Ind. 48. See, also, *Murrill v. State*, 46 Ala. 89. S. [Attempt to escape, as well as actual escape may be shown. *State v. Stevens*, 67 Ia. 557.]

Letters written by the defendant implicating him in an attempt to tamper with a witness and the jury are admissible against him. *People v. Marion*, 29 Mich. 31; *Adams v. People*, 16 N. Y. Sup. Ct. 89. So, also, evidence of an attempt at a former trial of the same cause, to corrupt a juror, as tending to prove the cause of action or ground of defence relied upon by the party making such attempt, false and dishonest. *Hastings v. Stetson*, 130 Mass. 76; *Gulerette v. McKinley*, 27 Hun. (N. Y.) 320; also the deportment of the accused when confronted with the corpse of the deceased. *Handline v. State*, 6 Tex. App. 347. But when the State has shown the conduct of the accused in the presence of the dead body, he cannot in rebuttal offer to prove what he said at the time. *U. S. v. Neverson*, 1 Mackey (D. C.) 152. Evidence that a justice who performed a marriage ceremony in which the girl was apparently under the age of consent, omitted all inquiry for her parents, is admissible to show that he knew the marriage was unlawful. *Bouker v. People*, 37 Mich. 4. When a man stole hogs and drove them home, false statements made by his wife as to them will not implicate her, in the absence of proof of her participation. *Porter v. State*, 43 Tex. 367. A proposal made by the wife of the accused, in his absence, to

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Presumption of guilt arising from the possession of stolen property. It has already been stated that possession is presumptive evidence of property, *supra*, p. 17; but where it is proved, or may be reasonably presumed, that the property in question is stolen property, the *onus probandi* is shifted, and the possessor is bound to show *20] that *he came by it honestly; and if he fail to do so, the presumption is that he is the thief or the receiver, according to circumstances. In every case, therefore, either the property must be shown to have been stolen, by the true owner swearing to its identity, and that he has lost it, or, if this cannot be done, the circumstances must be such as to lead in themselves to the conclusion that the property was not honestly come by. In the latter class of cases there are two presumptions: first, that the property was stolen; secondly, that it was stolen by the prisoner. The circumstances under which the former of these presumptions may be safely made are tolerably obvious.¹ "Thus," it is said in 2 East, P. C. 656, "a man being found coming out of another's barn, and upon search corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt. So persons employed in carrying sugar and other articles from ships and wharves, have often been convicted of larceny at the Old Bailey, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could not otherwise be proved. But this must be understood of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them." In *R. v. Dredge*, 1 Cox, Cr. Ca. 235, the prisoner was indicted for stealing a doll and other toys. The prosecutor proved that he kept a large toy-shop, and that the prisoner came into the shop dressed in a smock frock. After remaining there some time, from some suspicion that was excited, he was searched, and under his smock frock were found concealed the doll and other toys. The prosecutor could not go further than to swear that the doll had once been his, but he could not swear that he had not sold it, and he had not missed it; and from the mode in which he kept his stock it was not likely that he would miss that or any other of the articles found on the prisoner. Erle, J., directed an acquittal. In *R. v. Burton*, Dears. C. C. 282, the prisoner was indicted for stealing pepper. He was found coming out of a warehouse in which there was a quantity of pepper both loose and in bags; when stopped and accused, he threw some pepper on the ground, and said, "I hope you will not be hard with me." Upon the case of *R. v. Dredge* being cited, Maule, J., pointed out the distinction that in this case the prisoner had, in fact, admitted that the pepper had not been honestly come by; and he added "if a man go

have the criminal charge hushed up, is not admissible. *State v. Jaeger*, 66 Mo. 173. But that such a proposal was made by the accused is admissible, as also in rebuttal its acceptance by the prosecutrix. *McMath v. State*, 55 Ga. 303.

¹ *Shepherd v. State*, 44 Ark. 39. The jury may infer that the whole was stolen from proof of part. *People v. Fagan*, 66 Cal. 534.

into the London Docks sober, and comes out of one of the cellars, wherein are a million gallons of wine, very drunk, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was missed." In *R. v. Hooper*, 1 F. & F. 85, the prisoner was charged with stealing 190 lbs. weight of Lydney coal. He was left with a ton of that sort of coals in a cart at twelve o'clock, and delivered them, according to his orders, at one o'clock. At half-past twelve o'clock he sold 190 lbs. weight of Lydney coal to a person living in the same town, but there was no evidence of the quantity delivered being less than a ton, or of any coal having been missed. Willes, J., left it to the jury to say, whether the 190 lbs. of coal sold by the prisoner was stolen property.

If the property be proved to have been stolen, or may fairly be presumed to have been so, then the question arises whether or not the prisoner is to be called upon to account for the possession of *it. This he will be bound to do, and on his failing to do so, a [*21 presumption against him will arise, if taking into consideration the nature of the goods in question, they can be said to have been *recently* stolen. The presumption will be either that he stole the property or that he received it knowing it to be stolen. In what cases goods are to be considered recently stolen cannot be defined in any precise manner, but the following cases show what some of the judges have thought on the subject. Where stolen property (it does not appear of what description) was found in the possession of a person, but sixteen months had elapsed since the larceny, Bayley, J., held that he could not be called upon to account for the manner in which it came into his possession. *Anon.*, 2 C. & P. 457, 12 E. C. L. Where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner, two months after they had been stolen, Patterson, J., held that the prisoner ought to explain how he came by the property. "The length of time," said that learned judge, "is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time; but here that is not so." *R. v. Partridge*, 7 C. & P. 551, 32 E. C. L. But Park, B., directed an acquittal where the only evidence against the prisoner was that certain tools had been traced to his possession, three months after their loss; *R. v. Adams*, 3 C. & P. 600, 14 E. C. L.; and Maule, J., did the same, where a horse, alleged to have been stolen, was not traced to the possession of the prisoner until six months from the date of the robbery. *R. v. Cooper*, 3 C. & Kir. 318. Where the prisoner was the servant of a firm which owned a large number of shovels, four of which were found in his possession, it was held that the question of larceny was properly left to the jury, although there was no evidence to show when they were missed, or how long they had been in his possession. *R. v. Knight*, 1 L. & C. 578.

What the person found in possession of stolen property is called upon to do is, to account for how he came by it. In *R. v. Crowhurst*, 1 C. &

K. 370, 47 E. C. L., the prisoner was indicted for stealing a piece of wood; upon the piece of wood being found by the police constable in the prisoner's shop about five days after it was lost, he stated that he bought it of a man named Nash, who lived about two miles off. Nash was not called as a witness for the prosecution, and no witness was called by the prisoner. Alderson, B., said to the jury, "in cases of this nature you should take it as a general principle that, where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on the prisoner." It appears, therefore, that the learned judge thought that in this case the prisoner's account was sufficiently reasonable to shift the burden of proof back again on to the prosecutor, but the report does not state whether or not the case was left to the consideration of the jury. In *R. v. Wilson*, 26 L. J., M. C. 45, the prisoner was indicted for stealing some articles of dress. It was proved that the property was stolen and sold by the prisoner. The prisoner on being apprehended said, that C. and D. brought them to his house and that he sold them. In consequence of *22] this C. and D. were apprehended, *and C. was tried and convicted for stealing other articles taken from the prosecutor's house at the same time as the articles in question; D. was discharged. The constable made inquiries as to the statement made by the prisoner of how he came by the goods, but no evidence of what transpired on such inquiries was received, being objected to by the prisoner's counsel. Neither C. nor D. were called as witnesses for the prosecution, and no witness was called by the prisoner. The jury found the prisoner guilty, and the conviction was upheld by the court of criminal appeal, upon the ground, as stated by Pollock, C. B., that there was some evidence for the jury upon which the prisoner might be convicted.

"If a horse be stolen from A.," says Lord Hale, "and the same day B. be found upon him, it is a strong presumption that B. stole him; yet I do remember, before a very learned and wary judge, in such an instance, B. was condemned and executed at Oxford assizes; and yet, within two assizes after, C. being apprehended for another robbery, upon his judgment and execution, confessed he was the man that stole the horse, and being closely pursued, desired B., a stranger, to walk his horse for him while he turned aside upon a necessary occasion, and escaped, and B. was apprehended with the horse, and died innocently." 2 Hale, P. C. 289. The following remarks by Mr. East on this subject are well deserving of attention. "It has been stated before that the person in whose possession stolen goods are found must account how he came by them, otherwise he may be presumed to be the thief; and it is a common mode of defence, to state a delivery by a person unknown, and of whom no evidence is given; little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen, where persons really innocent have

suffered under such a presumption; and, therefore, where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence, from the time when the goods might be presumed to have first come into his possession." 2 East, P. C. 665.¹

¹ *Pennsylvania v. Myers*, Add. 320; *State v. Jenkins*, 2 Tyl. 379. [The recent possession of stolen property is presumptive evidence of guilt. *State v. Brown*, 75 Mo. 317; *State v. Butterfield*, Id. 297; *Tucker v. State*, 57 Ga. 503; *Foster v. State*, 52 Miss. 695; *Dillon v. People*, 1 Hun, 670; 4 Thomp. & C. (N. Y.) 208; *Harrison v. State*, 74 Ga. 801; *State v. Daly*, 37 La. An. 576.] The presumption that he who is found in possession of stolen goods recently after the theft was committed is himself the thief, applies *only* when this possession is of a kind which manifests that the stolen goods never came to the possessor *by his own act*, or at all events with his undoubted concurrence. *State v. Smith*, 2 Ired. 412. Thus where the defendant and two of his sons were indicted for stealing tobacco, which had been stolen in the night, was found next day in an outhouse of defendant, occupied by one of his negroes, and in which the defendant kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proved to be the tobacco that had been stolen; held that it was error in the judge to charge the jury "that the possession of the stolen tobacco found on defendant, raised in law a strong presumption of his guilt." Id. The possession of a stolen thing is evidence to some extent against the possessor of a taking by him. Ordinarily it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time, before a possession is shown in the accused, the law does not infer his guilt. *State v. Williams*, 9 N. C. 140. [The presumption arising from the possession of stolen property is not a legal one, but is for the jury. *Ayres v. State*, 21 Tex. App. 399.] The accused even when the stolen goods are found in his possession and under his control within a short time after the larceny is committed, and a presumption of guilt is raised, is not bound to show to the reasonable satisfaction of the jury that he became possessed of them otherwise than by stealing; the evidence may fall far short of establishing that, and yet create in the minds of the jury a reasonable doubt of his guilt. *State v. Merrick*, 19 Me. 398. Unexplained possession of stolen goods may be considered in determining the guilt of the possessor, but is not of itself sufficient to authorize a conviction. *People v. Ah Ki*, 20 Cal. 177; *People v. Gassaway*, 23 Id. 51. [*Pettigrew v. State*, 12 Tex. App. 225; *Truax v. State*, 12 Tex. App. 230; *Casas v. State*, 12 Tex. App. 59; *Turbeville v. State*, 42 Ind. 490; *Green v. State*, 68 Ala. 539; *Alexander v. State*, 60 Miss. 953; *Harris v. State*, 13 Tex. App. 309; *Shepherd v. State*, 44 Ark. 39. But see *Tilly v. State*, 21 Fla. 242.] The stealing must be proved in order to raise a presumption of guilt by the possession of the property of another. *State v. Taylor*, 25 Ia. 273. Possession of a stolen article raises a presumption of theft by the possessor, only in case such possession is so recent after the theft, that the possessor could not well have come by it except by stealing it. *Gregory v. Richard*, 8 Jones (L.), 410; *People v. Antonio*, 27 Cal. 404. [*State v. Jennett*, 88 N. C. 665; *Williamson v. State*, 13 Tex. App. 514; *Beck v. State*, 44 Tex. 430; *Yates v. State*, 37 Tex. 202.] See further as to the presumption from possession of stolen property. *State v. Bruin*, 34 Mo. 537; *Curtis v. State*, 6 Cold. 9; *State v. Brady*, 27 Ia. 126; *Billard v. State*, 30 Tex. 367; *People v. Kelly*, 23 Cal. 423; *State v. Gray*, 37 Mo. 463; *Conkwright v. People*, 35 Ill. 204; *Garcia v. State*, 26 Tex. 209; *State v. Creson*, 38 Mo. 372; *Unger v. State*, 42 Miss. 642; *Knickerbocker v. People*, 43 N. Y. 177; *State v. Turner*, 65 N. C. 592; *Commonwealth v. Bell*, 102 Mass. 103; *Heed v. State*, 25 Wis. 421. *State v. Wallace*, 47 Ia. 660.

Evidence of good character is admissible to rebut the presumption. *State v. Crank*, 75 Mo. 406; *Contra*, *Wagner v. State*, 107 Ind. 71. Where the accused gives a reasonable explanation of his possession of the stolen goods, and the State does not show the explanation to be false, he should be acquitted. *Johnson v. State*, 12 Tex. App. 385. Where a reasonable explanation has been given, the burden is upon the State of proving the falsity of such explanation. *Irvine v. State*, 13 Tex. App. 499. Compare *Sitterlee v. State*, Id. 587; *People v. Hurley*, 60 Cal. 74. The presumption of guilt from the possession of goods recently stolen is overcome by evidence raising a reasonable doubt. *State v. Richart*, 57 Ia. 245; *State v. Hopkins*, 65 Ia. 240; *State v. Peterson*, 67 Ia. 564. It is conclusive when unexplained, and there is no evidence of

The irreparable nature of the sentence of death, which so frequently followed conviction in former days, perhaps tended to increase the anxiety which both these learned persons evince on the subject of presumptive evidence.

With respect to the evidence of guilty knowledge in charges of receiving stolen goods, see *post*, "Receiving Stolen Goods."

Presumption of guilt arising from the possession of property in other cases. There are cases in which the possession of property carries with it the presumption of guilt, although the property has not been stolen; mostly cases where the property itself carries with it indications of a criminal act. Instances of cases in which such a presumption is drawn are the possession of filings and clippings of gold or silver coin, of more than five pieces of foreign counterfeit coin, of coining tools (see 24 & 25 Vict. c. 99), the possession of instruments or paper for foreign exchequer bills and bank notes (see 24 & 25 Vict. c. 98), the possession of deer, or implements for taking deer, of implements for housebreaking, of goods belonging to ships wrecked or stranded (see 24 & 25 Vict. c. 96), the possession of naval and military stores (see 38 & 39 Vict. c. 25, and other acts). These presumptions will be discussed under the headings of the principal offences to which they relate.

*23] ***Presumption of malice.** Much of the difficulty connected with this subject will be removed by considering what malice is in the legal sense of the term. "Malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse." Per Little-dale, J., in *M'Pherson v. Daniels*, 10 B. & C. 272, 21 E. C. L.; "We must settle what is meant by the term 'malice,'" said Best, J., in *R. v. Harvey*, 2 B. & C. 268, 9 E. C. L.; the legal import of this term differs from its acceptation in ordinary conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is not necessary in support of such indictment to show that the prisoner had any enmity to the deceased; nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional and done without any justifiable cause. Thus where a jury returned a verdict of guilty of murder, but said that they believed it was done without premeditation, Byles, J., refused to receive the verdict, saying, "the prosecutor is not bound to prove that the homicide was com-

good character. *State v. Kennedy*, 88 Mo. 341. The jury is to decide whether the explanation is reasonable. It is not to be taken as true simply because the prosecution does not rebut it. *State v. Kimble*, 34 La. An. 392. Declarations of the accused as to the character of his possession of the property alleged to have been stolen are not admissible, unless such possession and acts of ownership, at the time of such declaration are first proved. *Cameron v. State*, 44 Tex. 652. The statements of one accused of theft, when first arrested after being found in possession of stolen property, is admissible in evidence in his defence. *Shackelford v. State*, 43 Tex. 138; *Darnell v. State*, Id. 147.

mitted from malice prepense. If the homicide be proved, the law presumes malice; and, although it may be rebutted by evidence, no such attempt has been made here." *R. v. Maloney*, 9 Cox, C. C. 6.¹

All, therefore, that is meant by the presumption of malice is that when a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is presumed that he has acted advisedly and with an intent to produce the natural consequences of such an act. Thus in *R. v. Dixon*, 3 M. & S. 11, upon an indictment against the defendant, who was employed to make bread for a military asylum, for delivering bread made from unwholesome materials, it was held to be unnecessary to allege in the indictment, and, therefore, of course, unnecessary to prove, that the defendant intended to injure the health of any one, as that was an inference of law arising from the doing of the act. Where a man was convicted of setting fire to a mill, with intent to injure the occupiers thereof, a doubt occurred under the words of the 43 Geo. 3, c. 58, whether an intent to injure or defraud some person ought not to be proved; or at least some fact from which such intention could be inferred, beyond the mere act of setting the mill on fire; but the judges were of opinion that a person who does an act wilfully necessarily intends that which must be the consequence of the act, viz., injury to the owner of the mill burned. *R. v. Farrington*, Russ. & Ry. 207. And in *R. v. Rhilp*, 1 Mood. C. C. 263, where a part owner of a ship was indicted for setting fire to it with intent to prejudice his co-owners, it was held that the intent to prejudice was implied by the act, and that no proof of the intent was, therefore, necessary. The prisoner was indicted in a very recent case for wounding with intent, but the jury found him guilty of unlawful wounding only, and it was held by the fifteen judges that malice was a necessary ingredient in the offence of which he was found guilty, and by the majority of them that malice was sufficiently shown under the following circumstances. The prisoner and the prosecutor, who had been on good terms, were in separate punts upon the water on a light night. The prisoner had on different occasions said he would shoot at a wild fowl even if somebody was in the way at the time. The prisoner fired at *twenty-five yards distance, and at that moment the prosecutor's punt [*24 slewed round and he was shot. The prisoner then rendered help, and assured him it was an accident. It was stated in the case that it seemed probable that the prisoner only intended to frighten the prosecutor, and to deter him from coming to shoot there again. The court did not, however, give their reasons for arriving at the conclusion that there was evidence of maliciously wounding. *R. v. Ward*, L. R. 1 C. C. R. 356; 41 L. J., M. C. 69; but *Blackburn, J.*, in the course

¹ Proof of a crime sufficient to imply malice unless rebutted by some fact connected with the commission thereof, shifts upon the defendant the burden of proof to rebut such implication. *Fein v. Wyoming Ter.*, 1 Wy. Ter. 376. Such presumption cannot be rebutted by proof of declarations of the accused made after the commission of the offence. *U. S. v. Imsand*, 1 Woods, 581. Where the intent forms a material part of the offence there can be no conviction until the intent has been demonstrated beyond a reasonable doubt. *Mullins v. State*, 37 Tex. 337.

of the argument, said: "I have always thought a man acts maliciously when he wilfully does that which he knows will injure another in person or property." See also *Reg. v. Welch*, *post*, tit., "Cattle." Where by the words of the statute creating the offence, the offence must be done unlawfully and "maliciously," it must be shown to have been done "wilfully" by an intentional act; whatever may be the rule as to malice in cases of murder. A man who had been fighting in a crowd threw a stone which broke a window, but he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window: held not guilty. If the jury had found that the prisoner was aware that the window was where it was, and that he was likely to break it, and was reckless whether he broke it or not, it might have been different. *R. v. Pembliton*, L. R. 2 C. C. 119; 43 L. J., M. C. 91. The prisoner, with the intention of causing terror to persons leaving a theatre, put out the gas on a staircase, and also with the intention of obstructing the exit, placed an iron bar across a doorway. In attempting to escape several of the audience were by the crush injured, it was held that the prisoner was rightly convicted of unlawfully and maliciously inflicting grievous bodily harm upon two of the crowd. "He acted," said Lord Coleridge, "unlawfully and maliciously, not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured." Stephens, J., said: "if the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse, he did it 'wilfully,' that is, 'maliciously,' within the meaning of the statute." *R. v. Martin*, 8 Q. B. D. 54; 51 L. J., M. C. 36. Where the prisoner carelessly set fire to some rum which he intended to steal, and in consequence the ship in which the rum was placed, caught fire, it was held that he could not be convicted of arson of the ship. *Reg. v. Faulkner*, 13 Cox, C. C. R. Ir. 550. (See this case, *post*, tit., "Arson.") See *post*, "Malicious Injuries."

Presumption of intent to defraud. This presumption is very similar to that of malice; it is always made whenever the natural consequence of the act is to defraud, and no proof is necessary that such was the intention of the prisoner. The only cases which have arisen upon this head of presumptions relate to forgery and arson, with respect to which the law has been somewhat modified by statute; it is therefore considered more convenient to discuss it in the chapter relating to those classes of offences.

•HEARSAY.

[*25

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General nature of hearsay evidence. Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds. First, that the party originally stating the facts does not make the statement under the sanction of an oath; and secondly, that the party against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the party making the statement. A less ambiguous term by which to describe this species of evidence is *second-hand evidence*.¹

¹ But the remarks made by the witness himself to the defendant are not hearsay. *Charles v. State*, 49 Ala. 332. In an indictment for keeping a faro bank, a witness cannot testify that he understood from others that the defendant owned the faro bank. *Schooler v. State*, 57 Ind. 127; nor can a witness prove anything that took place between the accused and a third person, that person must be called as a witness. *Davis v. State*, 37 Tex. 237. For the same reason where a child is too young to testify as a witness, a statement made by it to others is not admissible in evidence. *Smith v. State*, 41 Tex. 352. In a prosecution for adultery parol evidence of the contents of a letter stating that the husband of one of the parties was dead, is inadmissible as hearsay. *State v. Henke*, 58 Ia. 457. *Willett v. People*, 27 Hun, (N. Y.) 469. The admission of the testimony of a witness that the shoes of the defendant, produced on the trial, would produce certain tracks, his knowledge of the character of these tracks being derived solely from what he had been told, was ground for error. *Bluitt v. State*, 12 Tex. App. 39; S. C. 41 Am. Rep. 668. The evidence given by a sworn interpreter is not hearsay. *People v. Ah Wee*, 49 Cal. 236. The admissions and declarations of third persons are hearsay and inadmissible. *Grigsby v. State*, 4 Baxter (Tenn.) 19; *State v. Swain*, 68 Mo. 605. As the threats of a mob against the defendant, made after the homicide. *State v. Sneed*, 88 Mo. 138. Except when part of the *res gestæ*. *State v. Gabriel*, 88 Mo. 631. So also self-serving declarations. *State v.*

Evidence to explain the nature of the transaction. The term hearsay evidence is frequently applied to that which is really not so in the sense in which that term is generally used. Thus, where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was said by those present during the continuance of the transaction, is admissible; and this is sometimes represented as an exception to the rule which excludes hearsay evidence. But this is not hearsay evidence; it is original evidence of the *26] most important and unexceptionable kind. In this case, it is *not a second-hand relation of facts which is received, but the declarations of the parties to the facts themselves, or of others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances. Thus it has been held on a prosecution for high treason, that the cry of the mob who accompanied the prisoner, may be received in evidence as part of the transaction. *R. v. Lord George Gordon*, 21 How. St. Tr. 535; *Best*, Ev. 572; *R. v. Damaree*, Fost. Cr. Law, 213; 15 How. St. Tr. 522. See also *Rouch v. The Great Western Railway Company*, 1 Q. B. 51, 41 E. C. L.; *R. v. Hall*, 8 C. & P. 358, 34 E. C. L.; *Doe v. Hardy*, 1 Moo. & Rob. 525. In *R. v. Bedingfield*, 14 Cox, C. C. 341, where a woman came from a house having had her throat cut immediately before by the prisoner, it was proposed to ask what she said; but Cockburn, C. J., said: "Anything uttered by the deceased at the time the act was being done would be admissible, as for instance, if she had been heard to say something as 'Don't, Harry.' But here it was something stated by her after it was all over, whatever it was, and after the act was completed." This decision gave rise to some discussion, of which a note will be found in the report of the case as cited above. It should seem that the ruling of Cockburn, C. J., was correct, if it is to be taken as a fact, that the transaction was entirely at an end, which it appears was the case. See letter of Cockburn, C. J., cited *infra*, p. 29. This evidence must not be confounded with evidence of what is said by the accused party himself, which is always capable of being received on another ground, namely, as an admission.¹ See tit. "Confessions."

Rutledge, 27 La. An. 378. But where part of the *res gestæ* such declarations are admissible. *State v. Walker*, 77 Me. 488. What deceased said to a third person in prisoner's absence, is hearsay. *Johnson v. State*, 63 Miss. 313; *Field v. State*, 57 Miss. 474.

¹ Where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*. *Sessions v. Little*, 9 N. H. 271. [*Williams v. State*, 4 Tex. App. 5; *Boothe v. State*, Id. 202; *Foster v. State*, Id. 246; *Allen v. State*, Id. 581. They can be offset only by declarations made by him at the same time. *State v. Gunter*, 30 La. An. Pt. 1, 536; *State v. Abbott*, 8 W. Va. 741. Self-serving declarations are admissible when part of the *res gestæ*. *State v. Walker*, 77 Me. 488. The guilty intent of a party may be shown by his acts, conduct, and declarations, made after as well as before the offence charged, and also at the time of the commission of the act. *State v. Pike*, 65 Me. 111; *State v. Lewis*, 45 Ia. 20; *Thompson v. State*, 11 Tex. App. 51; *Kernan v. State*, 65 Md. 253. So also the acts and exclamations of the prisoner's wife at the time of a murder and in his presence or hearing; *People v. Murphy*, 45 Cal. 137.] There are some cases in which

Evidence of complaint in cases of rape. The evidence which is almost always given in cases of rape that the woman made a com-

the declarations of a prisoner are admitted in his favor, mainly upon the principle of being part of the *res gestæ*; as to account for his silence where that silence would operate against him. *United States v. Craig*, 4 Wash. C. C. 729. So to explain and reconcile his conduct. *State v. Ridgeley*, 2 H. & McH. 120; *Robetaille's Case*, 5 Rog. 171. See *Tomkins v. Saltmarsh*, 14 S. & R. 275. [His declarations, however, made an indefinite time before the murder with which he is charged, cannot be given to explain his carrying arms on the day of the murder. *Terrell v. Commonwealth*, 13 Bush. (Ky.) 246; *Rutherford v. Commonwealth*, 13 Bush. (Ky.) 608; *Harmon v. State*, 3 Tex. App. 51; *Hester v. Commonwealth*, 85 Pa. 139; *Maddox v. State*, 41 Tex. 206.] Where a prisoner indicted for murder has produced evidence of declarations by the deceased, with a view to raise the presumption that he committed suicide, it is competent for the State to give in evidence the reasons assigned by him for his declaration. *State v. Crank*, 2 Bail. 66. See *Little v. Leiby*, 2 Greenl. 242; *Kimball v. Morrell*, 4 Greenl. 368; *Gorham v. Canton*, 5 Id. 266; *State v. Powell*, 2 Halst. 244; *Bennet v. Hethington*, 16 S. & R. 193. When the state of mind, sentiment, or disposition of a person at a given period become pertinent topics of inquiry, his declarations and conversations, being part of the *res gestæ*, may be resorted to. *Bartholemy v. People*, 2 Hill, 248. It is not competent for a prisoner indicted for murder to give in evidence his own account of the transaction related immediately after it occurred, though no third person was present when the homicide was committed. *State v. Tilly*, 3 Ired. 424; *contra Brunet v. State*, 12 Tex. App. 521. On the trial of a party who is indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it or cause or permit it to be used in coining or making such coin, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made. *Commonwealth v. Kent*, 6 Met. 583. *Semble*, in a criminal prosecution for damages, mere naked admissions made by the party libelled, are in general incompetent evidence against the people, even to establish facts tending to a justification: otherwise as to conversations or declarations which are part of the *res gestæ*. *Bartholemy v. People*, 2 Hill, 249. The declaration of a person, who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room upstairs into another room, is admissible in evidence after her death, as a part of the *res gestæ*. *Commonwealth v. Pike*, 3 Cush. 181. [*Harriman v. Stowe*, 57 Mo. 93; *Commonwealth v. Fenno*, 134 Mass. 217; but see *State v. Williams*, 34 La. An. 959; *People v. Ah Sing*, 60 Cal. 85; *State v. Carlton*, 48 Vt. 636.] On an indictment for a misdemeanor the declarations of the defendant were held admissible in evidence when they accompanied, explained, and characterized the acts charged. *State v. Huntly*, 3 Ired. 418. Whenever the bodily or mental feelings of an individual at a particular time are material to be proved, the expression of such feelings, made at or soon before that time, is evidence of course subject to be weighed by the jury. *Roulhac v. White*, 9 N. C. 63. The declarations of a party are admissible in his favor when they are so connected with some material act as to explain or qualify it, or show the intent with which it was done. *Russell v. Frisbie*, 19 Conn. 205. [When the question in issue is whether the defendant absconded, his declarations, made while on his way from his residence, as to his intention to return, are admissible. *United States v. Penn*, 13 Bankr. Reg. 464; *Hunter v. State*, 40 N. J. L. 495.] In an indictment for larceny, declarations at the time of his arrest by the prisoner as to his claim of ownership to the property taken, are not admissible in evidence. *State v. Wisdom*, 8 Port. 511. The declarations of third persons are not admissible in evidence as part of the *res gestæ*, unless they in some way elucidate or tend to give a character to the act which they accompany, or may derive a degree of credit from the fact itself. If they can have no effect upon the act done, and derive no credit from it, but depend for their effect upon the credit of the party who makes them, they are not admissible merely because they have some connection with the act or relate to it. *Woods v. Ranks*, 14 N. H. 101. [*People v. Mead*, 50 Mich. 228; *Greenfield v. People*, 85 N. Y. 75; *Wiggins v. People*, 4 Hun. (N. Y.) 540; *Robinson v. State*, 57 Md. 14; *Commonwealth v. Felch*, 132 Mass. 22; *Felt v. Amidon*, 43 Wis. 467; *State v. Brown*, 64 Mo. 367; see *Lauder v. People*, 104 Ill. 248.] When an act of a party is admissible in evidence, his declarations at the time, explanatory of that act, are also admissible, as a part of the *res gestæ*. *Wetmore v. Mell*, 1 O. 26; *Dawson v. Hall*, 2 Mich. 390. To

plaint of having been violated, is not hearsay, but original evidence of a fact, which is most important, and which cannot be ascertained

make declarations a part of the *res gestæ* they must be contemporaneous with the main fact—not, however, precisely concurrent in point of time. If they spring out of the transaction, elucidate it, are voluntary and spontaneous, and make at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous. *Mitcham v. State*, 11 Ga. 615; *Hanby v. Johnson*, 5 Md. 450. [*State v. Garrard*, 50 Oreg. 216; *State v. Lull*, 48 Vt. 581; *State v. Winner*, 17 Kan. 298; *Rockwell v. Taylor*, 41 Conn. 55; *Pierson v. State*, 21 Tex. App. 14.] Representations made by a sick person to a medical attendant as to his symptoms, are admissible. *Johnson v. State*, 17 Ala. 618. Any evidence giving an account of the acts of the accused on the day of the murder, is competent against him. *Campbell v. State*, 23 Ala. 44. What declarations are part of the *res gestæ* cannot be determined by any precise general rule, but only upon consideration of all the circumstances of each case. *Meek v. Perry*, 36 Miss. 190. In a murder case, the declarations of the murdered man charging the defendant with murder when brought with others into his presence, are admissible, not as dying declarations, but as a part of the circumstances relating to the conduct of the accused when first charged with the crime. *State v. Nash*, 10 Ia. 81. The rule that declarations of a party at the time of doing an act which is legal evidence, are admissible as parts of the *res gestæ*, does not apply so as to admit, as against third persons, declarations of a past fact, having the effect of criminating the latter. *People v. Simonds*, 19 Cal. 275. [*State v. Haynes*, 71 N. C. 79.] The exclamation or declarations of the prisoner at the time of the crime are admissible. *Mitcham v. State*, 2 Ga. 615. [False explanations of suspicious circumstances, made by the accused, are evidence. *Walker v. State*, 49 Ala. 398.] So silence is a fact, but to be weighed with great caution. *Johnson v. State*, 17 Ala. 618. Declarations of the prisoner, unless part of the *res gestæ*, are inadmissible in his behalf. *Tipper v. Commonwealth*, 1 Met. (Ky.) 6; *Dickes v. State*, 11 Ind. 557. [He cannot by offering proof of any act of his own lay the foundation for introducing his declarations accompanying that act. *Davis v. State*, 3 Tex. App. 91; nor can evidence be given on his behalf of a statement made by him subsequent to the crime with which he is charged. *Hall v. State*, 48 Ga. 607; *Powell v. State*, 44 Tex. 63; nor are his declarations made to the deceased, at the time of killing, charging him with having insulted his wife, admissible in the absence of direct testimony that such insult was given. *Bassham v. State*, 38 Tex. 622. Upon the question of the sanity of the prisoner, a letter written by him prior to the commission of the offence, is admissible in evidence to throw light on the condition of his intellect at the time of the act charged. *State v. King*, 64 Mo. 591; *Wharton's Crim. Evid.* § 272, 9th ed. A witness may testify that the accused stated after the homicide that he was sane when it was committed. *State v. Kring*, 74 Mo. 612. Declarations, etc., are admissible to explain mental feelings, as insanity, etc., as part of the *res gestæ*. *Brumley v. State*, 21 Tex. App. 222. Where a witness for the prosecution has testified that he charged the accused with the crime for which he is on trial, the prisoner should be allowed to elicit from the witness the reply to the accusation, though a declaration in his favor. *Sager v. State*, 11 Tex. App. 110. But self-serving declarations are generally inadmissible on his behalf. *Walker v. State*, 13 Tex. App. 618. In an action for assault and battery the defendant cannot prove declarations of the party assaulted made before or after the affray. *State v. Newland*, 27 Kan. 764. Declarations of the accused made before an alleged stealing claiming the property are admissible on his behalf. *State v. Thomas*, 32 La. An. 600.] The acts or declarations of the prisoner are not admissible evidence for him, unless they occurred within the period covered by the criminating evidence, or tend in some way to explain some fact or circumstance proved against him, or to impair or destroy the force of some evidence for the prosecution. *Chaney v. State*, 31 Ala. 342. [*State v. Ware*, 62 Mo. 597; *State v. Umfried*, 76 Mo. 404.] In a trial for murder, it is competent for the defendant to prove how he was employed at the time he met with the person he is charged to have killed, and what was his conduct a short time before the affray which resulted in the killing. *Stewart v. State*, 19 O. 302. In proceedings for assault with intent to kill, the evidence tended to show that defendant was assaulted by the injured party and several others: held that declarations of these persons made at the time of the assault, illustrative of its object and motive, were admissible in evidence as part of the *res gestæ*. *People v. Roach*, 17 Cal. 297. [But threats made by the deceased after the fatal wound are not part of the *res gestæ*. *Caw v. People*, 3 Neb. 357.] A declaration made by the accused on the day of the

in any other way. There seems indeed to have been at one time some obscurity about the extent to which this inquiry could be pursued,

crime, explaining how blood came upon his hands, is not admissible as part of the *res gestæ*. *Scaggs v. State*, 8 Sm. & Mar. 722. For the purpose of proving a bargain and sale, the declarations of the parties thereto at the time, are a part of the *res gestæ*, and competent to rebut the presumption arising from the possession of stolen property. *Leggett v. State*, 15 Griswold, 283. [*Phila. Fire Assoc. v. Merchants' Bank*, 54 Vt. 657.] On the trial of a defendant indicted for knowingly having in his possession an instrument adapted and designed for coining, or making counterfeit coin, it was held that he could not give in evidence his own declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made. *Commonwealth v. Kent*, 6 Met. 221. When one is indicted for murder, he cannot give in evidence his own conversations, had after going half a mile from the place of murder. *Gardner v. People*, 3 Scam. 83. Although the declarations or admissions of a party are evidence against himself, yet they do not when offered justify him in introducing proof of his counter declarations made at a different time, unless the latter form a part of the *res gestæ*. *Roberts v. Trawick*, 22 Ala. 490. See generally *Kirby v. State*, 7 Yer. 259; *Evans v. Jones*, 8 Id. 461; *Lund v. Tyngsborough*, 9 Cush. 36; *Cornelius v. State*, 7 Eng. 782; *State v. Schneider*, 35 Mo. 533; *Riggs v. State*, 6 Cold. 517; *State v. Gregor*, 21 La. An. 473; *Commonwealth v. Jasnes*, 99 Mass. 433; *Colquitt v. State*, 34 Tex. 550; *Cabell v. State*, 64 Ala. 195; *Garber v. State*, 4 Cold. 161; *Cross v. People*, 47 Ill. 152. [*Stiles v. State*, 57 Ga. 183. Where the State has shown the act of the accused in taking possession of a deadly weapon the defence is entitled on cross-examination to the remarks made by the accused at the time the weapon was taken. *Taliaferro v. State*, 46 Tex. 522. On telegrams as part of the *res gestæ*, see *Common v. Vosburg*, 112 Mass. 419. On a trial for false imprisonment evidence of menaces made by the injured person while detained are inadmissible. *Hawkins v. State*, 6 Tex. App. 452. On a trial for an indecent assault the plaintiff may testify that before the act the defendant had made improper addresses to her. *Mawich v. Elsey*, 47 Mich. 10. Where the issue is the forgery to a deed of a signature, the fact that one of the grantors denies having executed is of great weight as part of the *res gestæ*. *Baird v. Jackson*, 98 Ill. 78. Declarations both of the parties and of bystanders, made during an altercation, are admissible as part of the *res gestæ*, if necessary to a full understanding of the act complained of. *Baker v. Gaussin*, 76 Ind. 317; *Bejarano v. State*, 6 Tex. App. 265.] Declarations of the accused made when first charged with the crime, held to be admissible in his own favor as part of the *res gestæ*. *Comfort v. People*, 54 Ill. 404; *Head v. State*, 44 Miss. 731. See *Forrest v. State*, 21 O. St. 641; *Commonwealth v. Williams*, 105 Mass. 62; *State v. Graham*, 46 Mo. 490. A person accused of a capital crime is not permitted to prove his conduct and statements soon after the commission of the crime. *Hall v. State*, 40 Ala. 698. Declarations of the defendant in an indictment to one who was searching his house after the commission of the crime are not admissible in his own favor. *Commonwealth v. Cooper*, 5 Allen, 495. Statements of a person who has been robbed, made to a third party, as to the description of the parties committing the crime, are hearsay, and are not admissible on the part of the defendant to show that he was not the person thus described. *People v. McCrea*, 32 Cal. 98. Statements made to a thief at the time of the larceny are admissible against his accessory before the fact, as part of the *res gestæ*. *Parsons v. State*, 43 Ga. 197. Evidence of other distinct larcenies committed on the same day is not admissible. *State v. Wohlman*, 34 Mo. 482. S.

On the trial of an indictment for murder, the declarations of an unknown person are not admissible, when made prior to the murder, to identify the unknown with the person murdered. *Mershon v. State*, 51 Ind. 14. As a matter of general repute, evidence of character for drunkenness may be given in an action for selling intoxicating liquors, in order to prove knowledge by the vendor in whose neighborhood the vendee lived. *Adams v. State*, 26 O. St. 584. On an indictment of a jailer for assault and battery upon a prisoner, where the defence was disobedience of orders and the evidence showed that the jailer feared violence on the part of the prisoner, it is admissible to show that the sheriff who committed the prisoner told the jailer that he was dangerous and desperate. *State v. Lull*, 43 Vt. 581. The general reputation of a house as a house of ill-fame may be given in evidence upon a trial for keeping such a house. *People v. Buchanan*, 1 Idaho, N. S. 681. But of a disorderly house the reputation is inadmissible, being secondary evidence of disorder. *State v. Foley*, 45 N. H. 466; *Commonwealth v. Stewart*, 1 S. & R. 342. The declarations of a wounded

and, of course, if the investigation were not confined to the mere fact itself that this particular complaint was made, the evidence would be second-hand, and open to all the objections of that species of evidence. It will, perhaps, be convenient to examine the cases in this place. In *R. v. Brazier*, 1 East, P. C. 444, the prisoner was charged with assaulting a child of five years old, with intent to ravish her. The child was not tendered as a witness, but evidence was given of her complaint and of the particulars of it. The subject was twice discussed by the judges: on the first occasion, all except Gould and Willes, JJ., thought the evidence inadmissible; these two judges held that the presumption of law as to the incompetence of the child was conclusive, and that the evidence was admissible on that ground; and Buller, J., held the same, if by law the child could not be examined upon oath, about which he doubted. On the second occasion, however, all the judges being assembled, unanimously were of opinion that the child ought to have been tendered as a witness, and, if found to be competent, examined, and that, *consequently*, the evidence of her statement ought not to have been received. "It does not, however," adds the author, "appear to have been denied, by any in the above case that the fact of the child's having complained of the injury recently after it was received is confirmatory evidence." This case is wrongly quoted all through the books. In *R. v. Clarke*, 2 Stark. *27] *N. P. C. 242, 3 E. C. L., it was ruled by Holroyd, J., that the particulars of the complaint could not be given in evidence. In *R. v. Webber*, 2 Moo. & R. 212, Parke, B., seemed to think, that because the counsel for the defence could on cross-examination elicit the particulars of the statement, that it would be better to permit the evidence to be given at once in chief. But the reasoning seems in no way conclusive; for not only would the rules of evidence be thereby unnecessarily infringed, but it is obvious that, from the relation in which the woman who is said to have been violated stands to the prisoner, there can be no danger in allowing him to take advantage of any statements by her which make in his favor; those statements standing, in fact, in the place of admissions. In *R. v. Megson*, 9 C. & P. 420, 38 E. C. L., where the prosecutrix had died before the trial, and without her deposition having been taken, Rolfe, B., received evidence (the prisoner's counsel not objecting) that she had made a complaint, on her return home, of an outrage having been committed upon her, but held that the particulars of such complaint were not admissible. In a case where the prosecutrix was called, but did not appear, and it was objected on the part of the prisoners that evidence of recent complaint is receivable only to confirm the prosecutrix's story, and that as her evidence was not before the jury it could not be confirmed, Parke, B., rejected evidence of the prosecutrix having made a complaint. *R. v. Guttridge*, 9 C. & P. 471, 38 E. C. L. In *R. v. Osborne*, Car. & M. 622, the

person immediately after recovering consciousness lost on receiving the wound, are admissible. *Johnson v. State*, 65 Ga. 94. The infamy of a defendant, evidence of whose declarations may be given as part of the *res gesta*, does not affect their admissibility. *State v. Dellwood*, 32 La. An. 1229.

counsel for the prosecution proposed to ask whose name was mentioned in the complaint, which Cresswell, J., refused to permit. In that case the question whether a name *was* mentioned was admitted by the counsel for the prisoner to be unobjectionable, but it seems to be clearly out of the strict line. In *R. v. Nicholas*, 2 C. & K. 246, 61 E. C. L., the rape was on a child of ten years old, who was considered an incompetent witness, and the aunt was called, and was asked whether the child made any statement to her; she replied in the affirmative, and it was then proposed by the counsel for the prosecution to ask her the particulars of the statement, which Pollock, C. B., refused. It does not appear from the report that the evidence of the *fact* of complaint was objected to, though *R. v. Guttridge*, *ubi supra*, was referred to in the course of the discussion.¹

It thus appears that these cases are unanimous, that where the person who makes the complaint is called as a witness and is competent, the fact that the complaint was made, and the bare nature of it, may be given in evidence. Where the person who makes the complaint is not called as a witness, or, on being called, is found to be incompetent, the decisions are somewhat conflicting. On the one hand, it has been sought in this case to introduce the whole statement; on the other, attempts have been made to exclude, under these circumstances, all evidence about the statement whatever. Both contentions have some countenance of authority, but it is conceived that neither is strictly accurate; the true rule being, as is submitted, to admit evidence of the *fact* of complaint in all cases, and in no case to admit anything more. The evidence, when restricted to this extent, is not hearsay, but, in the strictest sense, original evidence; when, however, these limits are exceeded, it becomes hearsay in a very objectionable form. There is every reason, therefore, why it should be admitted to the extent indicated, and none why it should be admitted any further.² It appears to be highly objectionable in any case to admit the fact of the complaint and the name of the person *complained of, because, as pointed out by Bramwell, L. J., in *Reg. v. Wood*, 14 Cox, C. C. 46, [*28 the jury will, of course, *infer* that the woman complained of the offence as charged being committed by the prisoner; and such evidence having been given in the above case the Lord Justice ordered the whole conversation to be given in evidence. The case ended in an acquittal, and it is conceived must not be taken as a precedent.³

¹ See *contra*, *McMath v. State*, 55 Ga. 303.

² Although proof of the fact that the prosecutrix made immediate complaint is competent, evidence of the particulars of such complaint are inadmissible on behalf of the prosecution. *Baccio v. People*, 41 N. Y. 265. [*People v. Mayes*, 66 Cal. 597; *Johnson v. State*, 21 Tex. App. 368. Except as part of the *res gestæ*; see *McGee v. State*, Id. 670.] See *Lacy v. State*, 45 Ala. 80. [*State v. Jones*, 61 Mo. 232. Evidence is admissible that immediately after the alleged rape the prosecutrix charged the crime on the defendant. *Burt v. State*, 23 O. St. 394.] At the trial of an indictment for an assault with intent to commit a rape on a young child, whose tender age prevented her from giving any material testimony, it is not admissible to ask the mother, "Did the child tell you how this occurred at the time?" *People v. Graham*, 21 Cal. 261. S.

³ On the time within which the complaint was made see *Hill v. State*, 5 Lea. (Tenn.) 725.

Evidence of complaint in other cases. The same rule applies to other cases as to rape; namely, that where a person has been in any way outraged, the fact that this person made a complaint is good evidence, both relevant and admissible. Thus, in *R. v. Wink*, 6 C. & P. 397, 25 E. C. L., upon an indictment for robbery, evidence was given (without objection) by the prosecutor, that he made a complaint the next morning to a constable. He also stated (no objection being made) that he mentioned the name of a person, as the name of one of the persons who had robbed him, but this seems objectionable. The counsel for the prosecution then proposed to ask whose name was mentioned, but Patterson, J., refused to permit it, adding, "but when you examine the constable, you may ask him, whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person, and, if he did, who that person was." Cresswell, J., in the case of *R. v. Osborne*, Car. & M. 622, objects to the latter part of this dictum; but the questions suggested are certainly very common and rarely objected to, and, indeed, they hardly seem objectionable. On an indictment for shooting at the prosecutor, Patterson, J., held that evidence was admissible to show that the prosecutor, immediately after the injury, had made communication of the fact to another, but that the particulars could not be given in evidence. *R. v. Ridsdale*, York Spring Assizes, 1837; Stark. Ev. 469 (n).

There is a case of *R. v. Foster*, 6 C. & P. 325, 25 E. C. L., in which the prisoner was charged with manslaughter. A wagoner was called, who stated that immediately after the accident he went up to the deceased, and asked him what was the matter. It was objected that the reply of the deceased, which went to explain the cause of the accident, was not evidence, but Gurney, B., said that it was the best possible testimony that, under the circumstances, could be adduced to show what it was that had knocked the deceased down; and he added that the case of *Aveson v. Lord Kinnaird*, *infra*, p. 32, bore strongly upon the point, Park, J., and Patterson, J., concurring. In that case Lord Ellenborough said, "If at the time she fled from immediate personal violence from the husband, I should admit what was said." A somewhat similar case is that of *Thompson et ux. v. Trevanion*, Skin. 402, where, in action for an assault upon the wife, Holt, C. J., allowed what the wife said "immediate upon the hurt received, and before that she had time to devise and contrive anything for her own advantage," to be given in evidence.¹

These two cases are difficult to reconcile with established principles. It is to be observed that both extend to the *particulars* of what was said; and, though they were both made in close proximity to the event to which they profess to relate, it seems very questionable indeed whether that ground alone, as is presumed by Lord Holt, is sufficient to render them admissible. In *R. v. Foster* there *29] was the additional circumstance that the person who made the *statement was dead; but it seems to require much considera-

¹ On this see *Crookham v. State*, 5 W. Va. 510; Wharton's Crim. Evid. (9th edit.), § 296 and notes.

tion whether, as a general rule, the statements of a deceased person as to the circumstances of the injury which caused his death, made immediately after the injury, but not under circumstances which entitle them to be considered as dying declarations, are receivable in evidence.¹ The above remarks were cited with approval in a letter written by Lord Chief Justice Cockburn to Mr. John Pitt Taylor, the author of the well-known work on evidence, in which the chief justice defended

¹ In a criminal trial, the introduction by the State of a conversation between a witness and defendant, which contained no confessions by the latter, and was otherwise irrelevant, will not warrant the admission of a paper produced and read at the interview by the defendant. The introduction of immaterial testimony on one side, does not justify the admission of illegal testimony on the other. *Cook v. State*, 4 Zab. 843. If one party offers incompetent testimony, which is admitted without objection, the other party may introduce evidence of a like character to rebut it. *Herbush v. Goodwin*, 5 Fost. 452. No subsequent act or declaration of one defendant is competent evidence against another, indicted jointly with him. *Thompson v. Commonwealth*, 1 Metc. (Ky.) 13. [*Phillips v. State*, 6 Tex. App. 364; *People v. English*, 52 Cal. 212; *State v. Hickman*, 75 Mo. 416; *State v. Jackson*, 29 La. An. 354.] Statements of the deceased before the murder, that he was going to the place of the murder and prisoner was to accompany him, not made in the presence of the prisoner, are not admissible against him. *Kirby v. State*, 9 Yerg. 383. [As to what declaration of the accused as to his purpose in visiting the place of the homicide may be received in evidence against him, see *State v. Driscoll*, 44 Ia. 65. *Lamar v. State*, 63 Miss. 265; *Jackson v. State*, 52 Ala. 305. But anything uttered by the deceased at the time the act was being done is admissible. *State v. Wagner*, 61 Me. 178; *People v. Simpson*, 48 Mich. 474. But not an accusation made by the deceased in the presence of the prisoner after his arrest. *State v. Diskin*, 34 La. An. 919. Nor declarations made by the deceased as to the cause of his death in the absence of the prisoner. *Binns v. State*, 57 Ind. 46.] Threats of other persons against the deceased, or admissions by them that they had committed the crime, are only hearsay, and cannot be received in evidence. *State v. Duncan*, 6 Iredell, 236; *Rhea v. State*, 10 Yerg. 258. [*Crookham v. State*, 5 W. Va. 510; *State v. Davis*, 77 N. C. 483; *Bowen v. State*, 3 Tex. App. 617; *Boothe v. State*, 4 Tex. App. 202; *Walker v. State*, 6 Tex. App. 576. But see *Morgan v. Commonwealth*, 14 Bush. (Ky.) 106; *State v. Johnson*, 30 La. An. II, 921; *State v. Brown*, 21 Kan. 38.] A statement made by the deceased at the time of the murder, but denied by the prisoner, though admissible as part of the *res gestæ*, is no evidence of the truth of the facts stated. *Haile v. State*, 1 Swan, 248. Threats by the deceased against the accused, made to a third person, not shown to have been communicated, are not admissible for the defendant. *State v. Jackson*, 17 Miss. 544. [*State v. Maloy*, 44 Ia. 104; *Holly v. State*, 55 Miss. 424. But see *Thomas v. State*, 67 Ga. 460.] The admission against his interest, of a deceased person, of an act subjecting him to infamy and heavy penal consequences, is admissible as evidence of the fact, as between third persons. *Coleman v. Frasier*, 4 Rich. 146. Upon the trial of one for murder, it is not competent to prove the declarations of a third person, leading to the conclusion that he was guilty of the murder, and not the prisoner, as evidence in exculpation of the prisoner, if such third person examined as a witness, had implicated the prisoner by his testimony; it might have been received for the purpose of discrediting him, but is not competent testimony to establish the innocence of the prisoner, by fixing the crime upon the declarant. *Smith v. State*, 9 Ala. 990. [Otherwise where the declarations have been made within a short time of the transaction, and before a defence could have been arranged if the said third person has not implicated the prisoner. But it is not error to reject such testimony if such third person has in his examination sworn to the same effect. *O'Shields v. State*, 55 Ga. 696. On an indictment for larceny declarations of third persons that they committed the theft are inadmissible. *Daniel v. State*, 65 Ga. 199; *Greenfield v. People*, 85 N. Y. 75.] On the trial of an indictment for obtaining a signature to a deed by false pretences, previous conversations of the defendant with a third person as to procuring such a signature are admissible in evidence against him. *Commonwealth v. Castles*, 9 Gray, 121. S. Declarations of the defendant may be proved to show malice though the witness did not hear the entire conversation. *Terrell v. Commonwealth*, 13 Bush. (Ky.) 246. The reply made by the defendant to witness when he charged him with the crime is admissible on his behalf. *Shackleford v. State*, 43 Tex. 138.

his ruling in the case of *Reg. v. Bedingfield*, 14 Cox, C. C. 341, cited *ante*, p. 26.

Hearsay evidence—exceptions as to admissibility of. Though, as a general rule, hearsay, or, as it may more properly be called, second-hand evidence, is inadmissible, there are a considerable number of exceptions to the rule, which appear to be founded partly on the principle of necessity; hearsay being sometimes almost the only species of evidence which is available; and partly on the statement, of which evidence is given, having been made under circumstances which render its being false highly probable. They may be conveniently divided into the following heads:—1. Evidence which has already been given in judicial proceedings, and which cannot be obtained from the original source. 2. Statements contained in ancient documents on the subject of ancient possession. 3. Statements of deceased persons on questions of pedigree. 4. Evidence of reputation on questions of public or general right. 5. Statements of deceased persons speaking against their own interest. 6. Statements of deceased persons making entries, etc., in the regular course of their duty or employment. 7. Statements having reference to the health or sufferings of the person who makes them. 8. Dying declarations.

Evidence which has already been given in judicial proceedings. This subject will be found discussed in the chapter on Depositions.

Statements contained in ancient documents on the subject of ancient possession. This evidence rarely occurs in criminal cases. It will be found discussed in *Best, Ev. Part 3, Book 2, Chap. 1*; *Tayl. Ev. Part 2, Chap. 10*; *Stark. Ev. Part 1, Chap. 3*; *Ph. & Arn. Ev. Chap. 8, s. 1*.

Statements of deceased persons on questions of pedigree. The written or verbal declarations of deceased members of a family are admissible on questions of pedigree.¹ Declarations in a family, de-

¹ *Douglas v. Sanderson*, 1 Dall. 118; *Jackson v. Cooley*, 8 Johns, 128; *Gray v. Goodrich*, 7 Johns, 95. Hearsay is good to prove the fact of death: *Jackson v. Etz*, 5 Cow. 314; *Pancoast v. Addison*, 1 Har. & J. 356; see *Jackson v. Boneham*, 15 Johns, 226; *Ewing v. Savary*, 3 Bibb, 236; [*Thompson v. State*, 11 Tex. App. 51]; but not the place of birth: *Wilmington v. Burlington*, 4 Pick. 174 (see 1 Pick. 247); *Independence v. Pompton*, 4 Halst. 209; *Sheam v. Clay*, 1 Litt. 266; *Albertson v. Robeson*, 1 Dall. 9. So in a case of pedigree, hearsay of marriage is admissible, but not where it is to be shown as a substantive independent fact. *Westfield v. Warren*, 3 Halst. 249. Hearsay is only admissible where the fact is ancient, and no better evidence can be obtained. *Briney v. Hanse*, 3 Marsh. 326. And must be confined to what deceased persons have said. *Gervin v. Meredith*, 2 Car. Law 635. As to ex parte affidavits made abroad or by deceased persons, see 2 Stark. on Ev. 611, n. 3. The acts and declarations of the parties being given in evidence on both sides, on the question of marriage, on advertisement announcing their separation, and appearing in the principal commercial newspaper of the place of their residence, immediately after their separation, is part of the *res gestæ*, and admissible in evidence. Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury. *Jewell's Lessee v. Jewell*, 1 How. S. C. 219. The age of one member of a family may be proved by information of another member, derived

scriptions in a will, inscriptions upon monuments, in Bibles¹ and registry books, are all admitted upon the principle that they are the natural effusions of a party who must know the truth; and who speaks upon an occasion when the mind stands in an even position, without any temptation to exceed or fall short of the truth, and that to exclude them would be to exclude nearly all available evidence. *Per White-locke v. Baker*, 13 Ves. 514. But a pedigree collected from "registers, wills, monumental inscriptions, family records and history," is not evidence, although signed by members of the family, *Davies v. Lowndes*, 5 Bing. N. C. 161; except to show the relationship of persons described in it *as living*, S. C. 6 M. & Gr. 474; 7 Scott, N. R. 141.

The declarations must be by persons connected by family or *marriage with the person to whom they relate; and therefore [*30 what has been said by servants and intimate acquaintances;² *John-son v. Lawson*, 2 Bing. 86; 9 B. Moore, 183; or by illegitimate relations; *Doe v. Barton*, 2 Moo. & R. 28; is not admissible. See *Doe v. Davies*, 10 Q. B. 314. The declarations need not be contemporaneous with the matters declared. Thus a person's declaration that his grandmother's maiden name was A. B. is admissible. *Per Brougham C., Monkton v. Att.-Gen.*, 2 Russ. & M. 158.

If the declarations have been made after a controversy has arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage Case*, 4 Camp. 415. The term controversy must not be understood as meaning merely an existing suit. 2 Russ. & M. 161; *Walker v. Beauchamp*, 6 C. & P. 552. See further, *Crouch v. Hooper*, 16 Beav. 182.³

Evidence of reputation on questions of public or general right. On questions of public or general right; as a manorial custom; Denn

from family reputation, and declarations of a deceased mother, unless it appears that better evidence is in the power of the party. *Watson v. Brewster*, 1 Pa. St. 381. The declarations of a deceased member of a family, that the parents of it never were married, are admissible in evidence, whether his connection with that family was by blood or marriage. *Jewell's Lessee v. Jewell*, 1 How. S. C. 219. Hearsay is not evidence even in cases of pedigree, unless it appears that the person from whom the information is derived, is dead. *Mooers v. Bunker*, 9 Foet. 420; *Emerson v. White*, Id. 482. The declarations of deceased members of a family may be proved to show the time of the birth of a child belonging to that family, although there may be a family register of births in existence; for the one kind of evidence is of no higher dignity than the other. *Clements v. Hunt*, 1 Jones' Law, 400. [For the same reason a person may testify as to his own age, even though his parents are alive. *Hill v. Eldredge*, 128 Mass. 234; and also other relatives, *Weed v. State*, 55 Ala. 13; *Cherry v. State*, 68 Ala. 29; *State v. Cain*, 9 W. Va. 559. A child may also testify to the fact of his parentage. *Comstock v. State*, 14 Neb. 205.] It is not in cases of pedigree alone that hearsay evidence of the fact of death is admissible. *Primm v. Stewart*, 7 Tex. 178. S.

¹ *Douglass v. Sanderson*, 1 Dall. 116; *Curtis v. Patton*, 6 Serg. & R. 135; *Berry v. Waring*, 2 Har. & Gill, 103. S.

² *Chapman v. Chapman*, 2 Conn. 347; *Jackson v. Browner*, 18 Johns. 37; *Butler v. Haskill*, 4 Deasaus, 651; *Banert et ux. v. Day*, 3 Wash. C. C. 243. S.

³ The rule, *post litem motam*, has not been recognized in the United States. *Boudreau v. Montgomery*, 4 Wash. C. C. 186. S.

v. Spray, 1 T. R. 466; the boundaries between parishes and manors; *Nicholls v. Parker*, 14 East, 331;¹ or a ferry; *Pim v. Currell*, 6 M. & W. 234; a feeding *per cause de vicinage* existing by immemorial custom; *Prichard v. Powell*, 10 Q. B. 589; explained in *Earl of Dunraven v. Llewellyn*, 15 Q. B. 811, 812; hearsay or public reputation is admissible. But reputation is not evidence of a particular fact. *Weeks v. Sparke*, 1 M. & S. 687. So though general reputation is evidence, tradition of a particular fact is not; as that a house once stood in a particular spot. *Ireland v. Powell*, Peake, Ev. 15; *Cooke v. Banks*, 2 C. & P. 481. Declarations of old persons, concerning the boundaries of parishes, have been received in evidence, though they were parishioners, and claimed rights of common on the waste, which the declarations had a tendency to enlarge. *Nicholls v. Parker*, 14 East, 331; *Plaxton v. Dare*, 10 B. & C. 19. But the declarations of a deceased lord of the manor as to the extent of the waste, are not evidence. *Crease v. Barrett*, 5 Tyrwh. 458; 1 Cr. M. & R. 919. Where the question is, whether certain lands are in the parish of A. or B., ancient leases, in which they are described as lying in parish B. are evidence of reputation that the lands are in that parish. *Plaxton v. Dare*, 10 B. & C. 17; and see *Brett v. Beales*, M. & M. 416. The declaration of an old person, who is still living, is not admissible as proof of reputation. *Per Patteson, J.*, *Woolway v. Rowe*, 1 A. & E. 117; 1 Phill. Ev. 401, 10th ed. In order to admit of evidence of reputation, it is not necessary that user should be shown. *Crease v. Barrett, supra*. Declarations of this kind are not evidence *post litem motam*. *R. v. Cotton*, 3 Camp. 444.²

Statements of deceased persons against their own interests. The declarations of deceased persons made against their own interest are admissible; as where a man charges himself with the receipt of money, it is evidence to prove the payment. *Goss v. Watlington*, 3 B. & B. 132. *Whitnash v. George*, 8 B. & C. 556. So a statement by a deceased occupier of land, that he rented it under a certain person, is evidence of such person's seisin. *Uncle v. Watson*, 4 Taunt. 16. So a deed by a deceased party shown to be in the receipt of the rents and profits, in which S. is stated to be the legal owner in fee, is evidence of such ownership for a party claiming under S. Doe *31] *v. Coulthred*, 7 A. & E. 235. So a written attornment to L., by a tenant in possession, is evidence of L.'s seisin. *Doe v. Edward*, 5 A. & E. 95. The principle is, that occupation being pre-

¹ As to boundaries. *Howell v. Tilder*, 1 H. & McH. 84; *Bladen v. Maccubbin*, Id. 230; *Long v. Pellett*, Id. 531; *Hall v. Gitting's Lessee*, 2 Har. & Johns. 121; *Ralston v. Miller*, 3 Rand. 44; *Jackson v. Vidder*, 2 Cai. 210; *Caufman v. The Congregation*, 6 Binn. 59; *Wolf v. Wyeth*, 11 S. & R. 149; *Van Deusen v. Turner*, 12 Pick. 532; *Harriman v. Brown*, 8 Leigh, 697. Reputation and hearsay is such evidence as is entitled to respect on a question of boundary, when the lapse of time is so great as to render it difficult to prove the existence of the original landmarks. *Hillman v. Ward*, 1 W. & S. 68. S. See also, *People v. Hunt*, 59 Cal. 430.

² Historical facts of general and public notoriety, may be proved by reputation, and that by historical works, but not of a living author. *Morris v. Harmer's Lessee*, 7 Pet. 554. see 3 Wheel. C. C. 87, 88, etc.; *Gregory v. Baugh*, 4 Rand. 611. S.

sumptive evidence of a seisin in fee, any declaration claiming a less estate is against the party's interest. *Crease v. Barrett*, 5 Tyrwh. 473; 1 Cr. M. & R. 931. In all these cases it must appear that the effect of the declaration is to charge the party making it. *Calvert v. Archbishop of Canterbury*, 2 Esp. 646. If the party who made the entry be alive, although out of the jurisdiction of the court, so that he cannot be called, the proof of the entry is inadmissible. *Stephen v. Gwennap*, 1 Moo. & R. 121; *Smith v. Whittingham*, 6 C. & P. 78. And *semble*, that if the declaration be oral, it is in like manner inadmissible in evidence. *Stapylton v. Clough*, 2 E. & B. 933; *Bradley v. James*, 13 C. B. 822.

The declarations of persons who, at the time of making them, stood in the same situation and interest as the party to the suit, are evidence against that party; thus the declaration of a former owner of the plaintiff's land, that he had not the right claimed by the plaintiff in respect of it, is admissible; *Woolway v. Rowe*, 1 A. & E. 114; and even although he is alive, and not produced, S. C. The declarations of tenants are not evidence against reversioners, although their acts are. Per *Patteson, J.*, *Tickle v. Brown*, 4 A. & E. 378.

Statements of deceased persons in the regular course of their duty or employment. Where a person in the course of his employment makes a declaration, such declaration, after the death of the party, has in certain cases been admitted as evidence; as where an attorney's clerk indorsed a memorandum of delivery on his master's bill, this was held to be evidence of the delivery. *Champneys v. Peck*, 1 Stark. N. P. 404. See also *Furness v. Cope*, 5 Bing. 114. *Chambers v. Bernasconi*, 4 Tyrwh. 531; 1 Cr. M. & R. 347. So a notice indorsed as served by a deceased attorney's clerk, whose duty it was to serve notices, is evidence of service. *Doe v. Durford*, 3 B. & Ad. 890. So an entry of dishonor of a bill made by the clerk of a notary in the usual course of business, is evidence, after the clerk's decease, of the fact of dishonor. *Poole v. Dicas*, 1 New Cases, 649. So contemporaneous entries by a deceased shopman or servant in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. *Price v. Lord Torrington*, 1 Salk. 285. But it would appear that the person who made the entry, must have done the business to which it refers. *Brain v. Preece*, 11 M. & W. 773; and see *Doe v. Skinner*, 3 Ex. R. 84.¹

¹ Where a witness testified in respect to certain entries and memoranda made by him in the usual course of business, that it was his uniform practice to make such entries, etc., when the transaction occurred, and to make them truly, that he had no doubt the entries in question were so made, but that he had no recollection of the facts or transactions to which they related; *held*, that they might be given in evidence. *Bank of Monroe v. Culver et al.*, 2 Hill, 531. Entries and memoranda made by third persons in the usual course of business as notaries, clerks, etc., cannot be given in evidence on the ground merely that they are absent beyond the jurisdiction of the court; though otherwise when they are dead. *Brewster v. Doane*, 2 Hill, 537. The declarations of the payee of a negotiable note, made while he retains it in his possession, are admissible in evidence, although he may previously have written thereon his indorsement to a third person, in whose name the action is brought. *Whittier v. Vose*, 16 Me. 403. Entries in the course of business upon the books of a railroad company

In order to make such entries evidence, it must appear that the person who made them is dead; it is not sufficient that he is abroad, and is not likely to return. *Cooper v. Marsden*, 1 Esp. N. P. 1. The prisoner was indicted for the murder of a constable. The constable, in the course of his duty, had made a verbal statement in the nature of a report to his superior officer (an inspector of police), which was to the effect, that he intended to watch the prisoner's movements that night. Lush, J., after consultation with Mellor, J., admitted the statement. *R. v. Buckley*, 13 Cox, C. C. 293.

Statements having reference to the health or sufferings of the person who makes them. Upon this exception there is scarcely any direct authority. In *R. v. Blandy*, 15 How. St. Tr. 1135, the prisoner *was charged with having poisoned her father, and the *32] doctor was allowed, without objection, to state all that the deceased said in answer to inquiries respecting his health; but not only was he allowed to do this, but he also went on, still without objection, to state the answers of the deceased to inquiries put by him respecting the person who administered the poison which the deceased had taken, though no evidence was given, which showed that the deceased was then *in articulo mortis*; this case, therefore, could not now be considered an authority for any purpose. In *Aveson v. Lord Kinnauld*, 6 East, 188, the facts were somewhat peculiar. The action was brought on a policy of insurance, effected by a husband on the life of his wife. The defence was that the wife was a hard drinker, and was in ill-health at the time the policy was effected. The surgeon who had examined the woman on behalf of the office was called by the plaintiff, and he swore positively to his belief of her good health at the time, and said that he formed his opinion principally from the satisfactory answers which she gave to his inquiries. A witness was then called for the defence, who stated that she saw the deceased a day or two after the surgeon had examined her; that she then complained of being unwell; and said that she was unwell when she went to see the surgeon, with other similar statements. A verdict was found for the defendant, and a rule for a new trial obtained by the plaintiff on the ground that evidence of these statements ought not to have been received, which rule was discharged. It was assumed by all the judges, that what was said by the deceased to the surgeon was evidence of her state of health at the time; and they all thought that this evidence having been produced by the plaintiff, it was open to the defendant to rebut it by showing that she had made different statements on another occasion upon the same subject. In the *Gardiner Peerage* case, reported by *LeMarchant*, a great many doctors were examined on the part of the claimant as to their experience of cases of protracted gestation. In order to ascertain the circumstances of these

by one, then an agent of the company, and still living, but absent from the State, are not competent evidence of the facts therein set forth, upon the trial of a third person for crime. *State v. Thomas*, 64 N. C. 74. S.

But see *Rogers v. State*, 11 Tex. App. 608; *Rizer v. Callen*, 27 Kan. 339; *State v. Masters*, 28 La. An. 268.

cases, it was necessary to inquire into the *data* upon which the witnesses had formed their calculations, but these depended on the answers of women to certain medical inquiries involving facts which had taken place some months previously. Evidence of what these answers were was repeatedly objected to, and finally rejected by the committee upon the advice of Lords Giffard and Redesdale. In *R. v. Johnson*, 2 C. & K. 354, 61 E. C. L., the prisoner was charged with having murdered her husband, and in order to prove the state of health of the deceased prior to the day of his death, a witness was called who had seen him a day or two before that time; and on this witness being asked in what state of health the deceased appeared to be when he last saw him, he began to state a conversation which had then taken place between the deceased and himself on this subject. This was objected to on behalf of the prisoner, but Alderson, B., said that he thought that what the deceased person said to the witness was reasonable evidence to prove his state of health at the time.

The result of the cases seems to be this; that, if it becomes necessary to inquire into the state of health at a particular time of a person who is deceased, a witness may detail what the deceased person has himself said on that subject at that time; and this whether he be a medical man or not. But perhaps a medical man might go further, and, even in case of a person who is still living, state the answers to *inquiries made by him having reference to such person's health; [*33 this evidence is frequently given in cases of assault, in order to prove what the person assaulted has suffered. See per Lawrence, J., in *Aveson v. Lord Kinnaird*, 6 East, 198.¹

Dying declarations. Evidence of this kind, which is peculiar to the case of homicide, has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye-witness to the fact, and the usual witness in other felonies, viz., the party injured himself, is got rid of. 1 East, P. C. 353. But it is said by Eyre, C. B., that the general principle upon which evidence of this kind is admitted is, that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration: to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court. *R. v. Woodcock*, 1 Leach, 502; *R. v. Bernadotti*, 11 Cox, C. C. 316. Probably it is the concurrence of both these reasons which led to the admission of this species of evidence.

¹ A sick person's representation as to the true nature, symptoms, and effect of his malady, made while he is suffering under it, are original evidence to whomsoever they may be made; but are entitled to greater weight if made to a medical attendant. *Perkins v. Concord Railroad*, 44 N. H. 223; *Stone v. Watson*, Shep. Sel. Cas. 236, S. C. 37 Ala. 279. [But see *State v. Geddicke*, 43 N. J. L. 86.] A narration by a patient to his physician of the cause of injuries received several months previously, is not admissible as evidence of that cause. *Chapin v. Marlborough*, 9 Gray, 244. S.

But see *Smith v. State*, 53 Ala. 486; *Hays v. State*, 40 Md. 633; *Morrissey v. Ingham*, 111 Mass. 63.

The declaration must have been made by a person who, if alive, would have been a competent witness. Thus, on an indictment for the murder of a girl four years of age, Park, J., refused to hear evidence of her declarations, observing that, however precocious her mind might be, it was impossible that she could have had that idea of a future state which is necessary to make such a declaration admissible. In this decision, Parke, B., concurred. *R. v. Pike*, 3 C. & P. 598, 14 E. C. L. But when the child is of an intelligent mind, impressed with the nature of an oath, and expecting to die, the declaration is receivable. See *R. v. Perkins*, 2 Moo. C. C. 135; 9 C. & P. 395, 38 E. C. L., where the child was eleven years old, stated *post*, p. 35. It is no objection to the evidence that the deceased person was *particeps criminis* (as a woman who has been killed in attempting to procure abortion). *R. v. Tinkler*, 1 East, 354. So the statement of the deceased must be such as would be admissible if he were alive and could be examined as a witness; consequently, a declaration upon matters of opinion, as distinguished from matters of fact, will not be receivable. *R. v. Sellers*, Carr. Supp. Cr. L. 233. Dying declarations in favor of the party charged with the death were admitted by Coleridge, J., in *R. v. Scaife*, 1 Moo. & R. 551.¹ It is no objection to a dying declaration that it has been elicited by questions put to the deceased. *R. v. Fagent*, 7 C. & P. 238, 32 E. C. L. See also *R. v. Reason*, 1 Str. 499; *R. v. Woodcock*, 1 Leach, 500. In the last case the deceased was examined upon oath by a magistrate, and the examination signed by both. See also *R. v. Smith*, 1 L. & C. 607. The question, whether a dying declaration is admissible in evidence, is exclusively for the consideration of the court. Per Lord Ellenborough, *R. v. Huck*, 1 Stark. N. P. 523, 2 E. C. L. See also *R. v. John*, 1 East, P. C. 357; 1 Lea. 505 (n.). 1 Phill. Ev. 250, 10th ed.²

¹ Dying declarations of the deceased may be received in favor of the defendant. *Moore v. State*, 12 Ala. 764; *People v. Knapp*, 26 Mich. 112. *Contra*, *Adams v. People*, 47 Ill. 376; *Moeck v. People*, 100 Ill. 242. But they must be made under a sense of impending dissolution. *People v. McLaughlin*, 44 Cal. 435, following *Commonwealth v. Densmore*, 12 Allen, 535; *People v. McCrea*, 32 Cal. 100.

² *State v. Ferguson*, 2 Hill, (S. C.) 619; *Oliver v. State*, 17 Ala. 587; *McLean v. State*, 16 Id. 672. Dying declarations of a person who has been killed, made with regard to the circumstances which caused his death, are to be received with the same degree of credit as the testimony of the deceased would have been had he been examined on oath. *Green v. State*, 13 Mo. 382. [*Ward v. State*, 78 Ala. 441.] *Contra*, see *Lambeth v. State*, 1 Cush. 322. By the common law, in indictments for murder, the declarations of the deceased, made after the mortal wound, and under the apprehension of death are admissible in evidence. *Woodside v. State*, 2 How. (Miss.) 655; *Campbell v. State*, 11 Ga. 353; *Nelson v. State*, 7 Humph. 542; *Smith v. State*, 9 Humph. 9; *Hill v. Commonwealth*, 2 Gratt. 594; *Moore v. State*, 12 Ala. 764; *Commonwealth v. Murray*, 2 Ash. 41; *Commonwealth v. Williams*, Id. 69; *Green v. State*, 13 Mo. 382; *Vase's Case*, 3 Leigh, 786; *McDaniel v. State*, 8 Smed. & M. 401; *Anthony v. State*, 1 Meigs, 265; *Donnelly v. State*, 2 Dutch. 463, 601; *State v. Scott*, 12 La. An. 274; *Brakefield v. State*, 1 Sneed, 215; *Ilpatrick v. Commonwealth*, 7 Cas. 198; *State v. Cornish*, 5 Harring. 502; *Bull's Case*, 14 Gratt. 613; *Thompson v. State*, 24 Ga. 297; *McHugh v. State*, 31 Ala. 317; *Brown v. State*, 32 Miss. 433; *Commonwealth v. Casey*, 11 Cush. 417; *Walston v. Commonwealth*, 16 B. Mon. 15; *Starkey v. People*, 17 Ill. 17; *State v. Dominique*, 30 Mo. 585; *People v. Lee*, 17 Cal. 76; *People v. Ybarra*, Id. 166; *Commonwealth v. Casey*, 12 Cush. 246; *Burrell v. State*, 18 Tex.

Dying declarations—admissible only in cases of homicide, where the circumstances of the death are the subject of the declaration.

713; *People v. Glenn*, 10 Cal. 32; *State v. Nash*, 7 Clarke, 347; *State v. Terrell*, 12 Rich. Law, 321; *State v. Gillich*, 7 Clarke, 287; *Robbins v. State*, 8 O. (N. S.) 131; *State v. Brunette*, 13 La. 45. [Style v. Spencer, 30 La. An. 362; *Pierson v. State*, 21 Tex. App. 14; *Kehoe v. Commonwealth*, 85 Pa. St. 127; *State v. Johnson*, 76 Mo. 121. After the proper foundation is laid for them the defence should move to exclude them from the jury if they are indefinite or not pertinent to the issue. *Scott v. People*, 63 Ill. 508.] Such evidence is only admissible under a rule of necessity, and constitutes the only case in which evidence is admissible against the accused, without the opportunity of a cross-examination. *Nelms v. State*, 13 Smed. & M. 500. [Notwithstanding the clause in the Bill of Rights securing to the prisoner the right to meet the witnesses face to face. *State v. Dickinson*, 41 Wis. 299.] The proof of the deceased's apprehension of death is not confined to his declarations, but the fact may be satisfactorily established by the circumstances of the case. *Hill v. Commonwealth*, 2 Gratt. 594; *McLean v. State*, 16 Ala. 672; *Commonwealth v. Murray*, 2 Ash. 41; *Commonwealth v. Williams*, Id. 69; *People v. Green*, 1 Park. C. R. 11; *Lewis v. State*, 9 Smed. & M. 115; *Montgomery v. State*, 11 Stanton, 424. [*People v. Gray*, 61 Cal. 164; *Sullivan v. Commonwealth*, 93 Pa. St. 234.] In order to make dying declarations admissible in evidence, the deceased must not only be actually in a dying condition, but must believe that he is so. This belief may be inferred from the statements of the party, and also from the nature of the wound and other circumstances. *Campbell v. State*, 11 Ga. 353; *People v. Green*, 1 Park. C. R. 11; *People v. Grunzig*, Id. 299; *People v. Knickerbocker*, Id. 302; *State v. Peace*, 1 Jones' Law, 251. If, at the time of the declarations, he was in fact in a condition to make them competent, a hope of recovery at a subsequent time would not render them incompetent. *State v. Tilghman*, 11 Ired. 513. In order to make the declarations of the deceased evidence, it is not necessary that he should be *in articulo mortis*. *State v. Tilghman*, 11 Ired. 513; *State v. Poll*, 1 Hawks, 442. Declarations made in the last illness, by one who said he should die, but whom the physician had just told he might recover, are not admissible as dying declarations. *People v. Robinson*, 2 Parker C. R. 235. When a *prima facie* case has been made out, it is a question of fact for the jury whether or not the declarations were made in immediate prospect of death. *Campbell v. State*, 11 Ga. 353. [*Jackson v. State*, 56 Ga. 235.] The only satisfactory principle upon which the dying declarations of a person deceased can be admitted to establish the circumstances of his death, appears to be that they were made at a time when all expectation of recovery was abandoned. *Dunn v. State*, 2 Ark. 229. [*Ex parte Nettles*, 58 Ala. 268.] The question whether statements offered as dying declarations are admissible as such, is for the court. *State v. Howard*, 32 Vt. 380. [*Commonwealth v. Sullivan*, 13 Phila. (Pa.) 410.] The declaration of a person wounded and bleeding that the defendant had stabbed her, made immediately after the occurrence, is competent to be put in evidence after her death, as part of the *res gestæ*. *Commonwealth v. McPike*, 3 Cush. 181. When on trial for murder, the declarations of the deceased have been offered in evidence, and an attempt has been made on the other side to destroy the effect of such declarations, by showing the bad character of the deceased, the State, for the purpose of corroborating the evidence, may prove that the deceased made other declarations to the same purport a few months after he was stricken, though it did not appear that he was then under the apprehension of immediate death. *State v. Thomason*, 1 Jones' Law, 274. [*State v. Blackburn*, 80 N. C. 474.] The dying declarations of a party are only admissible on a trial of homicide, when the death of the deceased is the subject of the charge and the circumstances of the subject of them. *Lambeth v. State*, 23 Miss. 323. The deceased was shot at night by an unknown person; his declaration that the prisoner was the only slave on the place at enmity with him, was not admitted. *Moser v. State*, 35 Ala. 421. Dying declarations must be restricted to the act of killing, and the circumstances immediately attending the act and forming a part of the *res gestæ*. *State v. Shelton*, 2 Jones' Law, 360. [*People v. Olmstead*, 30 Mich. 431; *Luby v. Commonwealth*, 12 Bush, (Ky.) 1. In Texas it has been held that dying declarations of the deceased are competent to prove his name as alleged in the indictment. *Lister v. State*, 1 Tex. App. 739. See *State v. Hamilton*, 27 La. An. 400.] On the trial of a man for the murder of his wife, her declarations made *in extremis* as to the cause of her death, are competent evidence against the prisoner. *People v. Green*, 1 Den. 614; *Moore v. State*, 12 Ala. 164. It makes no difference that there are other witnesses by whom the same facts might be shown which are sought to be established

It is a general rule, that dying declarations, though made with a full consciousness of approaching death, are only admissible in evidence *34] where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. Per Abbott, C. J., *R. v. Mead*, 2 B. & C. 605, 9 E. C. L.; 4 D. & R. 120. Therefore, where a prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion, and evidence of the woman's dying declarations was tendered, Bayley, J., rejected it, observing, that although the declarations might relate to the cause of the death, still such declarations were admissible in those cases only where the death of the party was the subject of inquiry. *R. v. Hutchinson*, 2 B. & C. 608 (n.), 9 E. C. L.¹ A man having been convicted of perjury, a rule for a new trial was obtained, pending which the defendant shot the prosecutor, who died. On showing

by the dying declarations. *People v. Green*, 1 Parker's C. R. 302. [Dying declarations, when admissible, may always be proved, even though there is abundant evidence without them. *Battle v. State*, 74 Ga. 101.] The dying declarations of a wounded man as to his belief respecting the intentions of his assailant to injure him, are not competent. *McPherson v. State*, 22 Ga. 478. [Nor his general expressions of opinion, or his suspicions, *Shaw v. People*, 5 Thomp. & C. (N. Y.) 439; 3 Cow. 272. But a dying declaration, "A. B. shot me," was held admissible as a statement of fact, though the shot was fired through an auger hole. *Walker v. State*, 39 Ark. 221. *Montgomery v. State*, 80 Ind. 338. *Roberts v. State*, 5 Tex. App. 541.] Dying declarations are restricted to the trial of the identical homicide of the person who makes the declaration. *Hudson v. State*, 3 Cold. 355; *State v. Fitzhugh*, 2 Oreg. 227; *State v. Wilson*, 23 La. An. 558. The dying declarations of the deceased respecting the state of feeling which existed between himself and the prisoner, are not admissible for the prosecution. *Ben v. State*, Shep. Sel. Cas. 9; 37 Ala. 103. [*Reynolds v. State*, 68 Ala. 502.] Leading questions may be put to the declarant, and he may even be pressed to answer, subject to the effect of these acts on the value of his testimony. *People v. Sanchez*, 24 Cal. 17. [*Ingram v. State*, 67 Ala. 67.] Belief of impending death may be shown circumstantially, without proving express statements of the declarant to that effect. Id. Evidence of dying declarations may be rebutted by evidence of contradictory statements. *People v. Lawrence*, 21 Cal. 368. [*Battle v. State*, 74 Ga. 101.] If dying declarations have been admitted to prove the identity of the defendant as the person who committed a crime, evidence is admissible in reply to show that the deceased had met and talked with persons with whom he was well acquainted, mistaking them, at the time, for other persons whom they did not resemble, and that he was in the habit of thus mistaking persons. *Commonwealth v. Cooper*, 5 Allen, 495. The competency or sufficiency of dying declarations cannot be objected to on the ground that the deceased did not give a complete narration of all that occurred, or might be legitimately supposed to have occurred, if it does not appear but that he said all he desired to say and fully completed his declarations. *State v. Nettlebush*, 20 Ia. 257. A dying declaration having been admitted in evidence, it is admissible to discredit it by proof that the deceased did not believe in a future state of rewards and punishments. *Goodall v. State*, 1 Oreg. 333. See generally *Commonwealth v. Densmore*, 12 Allen, 535; *People v. Knapp*, 1 Edm. 177; *Hatchett v. People*, 54 Barb. 370; *Nesbit v. State*, 43 Ga. 238; *State v. Williams*, 67 N. C. 12; *Wroe v. State*, 20 O. St. 460; *Dixon v. State*, 13 Fla. 636; *Barnet v. People*, 54 Ill. 325; *Commonwealth v. Britton*, 1 Camp. 13; *Murphy v. People*, 37 Ill. 447; *Hill v. State*, 41 Ga. 484; *Duling v. Johnson*, 32 Ind. 155; *State v. Quick*, 15 Rich. (Law) 342; *People v. Vernon*, 35 Cal. 49. S.

Proof that the deceased is an atheist does not render the dying declarations incompetent. It may be received to impeach the credibility of the declarant. *State v. Elliot*, 45 Ia. 486. The dying declarations must be those of the murdered, not of a witness since deceased. *Potettee v. State*, 9 Baxter (Tenn.) 261.

¹ *Railing v. Commonwealth*, 16 W. N. C. (Pa.) 452; S. C. 1 Pa. Sup. Ct. Dig. 121.

cause against the rule, an affidavit was tendered of the dying declarations of the prosecutor as to the transaction out of which the prosecution for perjury arose; but the court were of opinion that this affidavit could not be read. *R. v. Mead*, 2 B. & C. 605, 9 E. C. L.; 4 D. & R. 120. So evidence of the dying declarations of the party robbed has been frequently rejected on indictments for robbery. *R. v. Lloyd*, 4 C. & P. 233, 19 E. C. L.; also by Bayley, J., on the Northern Spring Circuit, 1822, and by Best, J., on the Midland Spring Circuit, 1822; 1 Phill. Ev. 241, 10th ed.

In one case where A. and B. were both poisoned by the same means, upon an indictment against the prisoner for the murder of A., evidence was allowed by Coltman, J., after consulting Parke, B., to be given of the dying declarations of B.; the ground alleged being "that it was all one transaction." *R. v. Baker*, 2 Moo. & Rob. 53. But in *R. v. Hind*, 29 L. J., M. C. 148, a case similar to that of *R. v. Hutchinson*, *supra*, Pollock, C. B., said, "The rule we are supposed to adhere to is that laid down in *R. v. Mead*; there Abbott, C. J., says that the general rule is that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration."¹

Dying declarations—the situation of the party who makes them. Dying declarations are only admissible when made by a person who is under the influence of an impression that his dissolution is impending. There must be no hope, not only of ultimate recovery, but of a prolonged continuance of life. If that impression exist in the mind of the sufferer, it will not render the statement inadmissible that death does not in fact take place till some time afterwards.²

In order to judge whether or not such is the state of the mind of the person in question, the whole of the circumstances must be looked at. It may be as well shortly to state in chronological order some of the cases in which the statements have been admitted or rejected; premising, however, that it is by no means suggested that they can become precise precedents for any future cases that may arise; it being impossible to bring before the mind by a verbal relation, however minute, many circumstances which take place at a trial by which the mind of the presiding judge would be influenced. Without such precaution a perusal of the reports of these cases, and still more so of the

¹ See the Texan Code on this subject. *Krebbs v. State*, 3 Tex. App. 348; *Wright v. State*, 41 Tex. 246; *Walker v. State*, 52 Ala. 192; *State v. Bohan*, 15 Kan. 407; *Brown v. Commonwealth*, 73 Pa. St. 321; *Crookham v. State*, 5 W. Va. 510. Declarations as to previous threats are inadmissible. *State v. Wood*, 53 Vt. 560. The declarations can only be respecting the cause of death. *State v. Garrand*, 5 Oreg. 216.

² *May v. State*, 55 Ala. 39; *Edmonson v. State*, 41 Tex. 496; *People v. Ah Dat*, 49 Cal. 652; *Johnson v. State*, 50 Ala. 456; *Faire v. State*, 58 Ala. 74; *State v. Garrand*, 5 Oreg. 216; *State v. Draper*, 65 Mo. 335. Dying declarations are admissible when made under a sense of impending dissolution though declarant may never have expressed the conviction. *Wills v. State*, 74 Ala. 21. Declarations made at a time when declarant believed he would recover, but afterwards reaffirmed when he perceived that he would die are admissible. *Mockabee v. Commonwealth*, 78 Ky. 380; *State v. McEvoy*, 9 S. C. 208.

abridgment which is here given, might lead to serious error, but with it they will be useful as showing the aspect under which the question has been hitherto viewed.

In *R. v. Woodcock*; 1 Leach, 503; and *R. v. John*, 1 East, 357; *35] *1 Leach, 504 (n), this kind of evidence was received under circumstances which would not now be considered sufficient to render it admissible. In the first, the surgeon distinctly stated that he did not think the deceased was aware of her situation; in the second, the deceased had never expressed the slightest apprehension of danger; and in neither case were there any circumstances which led to a different conclusion. In *R. v. Woodcock*, no case was reserved by Eyre, C. B., for the opinion of the judges; but in *R. v. John*, the judges, on a case reserved, held that the evidence was wrongly received. These cases have been frequently misquoted.

In *R. v. Christie*, Carr. Supp. C. L. 202, the deceased asked his surgeon if the wound was necessarily mortal, and on being told that a recovery was just possible, and that there had been an instance where a person had recovered from such a wound, he replied, "I am satisfied," and after this made a statement; it was held by Abbott, C. J., and Park, J., to be inadmissible. In *R. v. Van Butchell*, 3 C. & P. 631, 14 E. C. L., the deceased said, "I feel that I have received such an injury in the bowel that I shall never recover;" and, on his doctor trying to cheer him, he said that he felt satisfied he should never recover; Hullock, J., rejected the evidence, saying that a man might receive an injury from which he might think that he should ultimately never recover, but still that would not be sufficient to dispense with an oath. See *R. v. Reaney*, *infra*, p. 36.¹ In *R. v. Crockett*, 4 C. & P. 544, 19 E. C. L., the surgeon said, "I had told the deceased she would not recover, and she was perfectly aware of her danger; I told her I understood she had taken something, and she said she had, and that damned man had poisoned her. I asked her what man, and she said Crockett. She said she hoped I would do what I could for her for the sake of her family. I told her there was no chance of her recovery." Bosanquet, J., thought a degree of hope was shown, and struck out the evidence. In *R. v. Hayward*, 6 C. & P. 157, 25 E. C. L., Tindal, C. J., observed that "any hope of recovery, however slight, existing in the mind of the deceased at the time of the declaration being made, would undoubtedly render the evidence of such declarations inadmissible." In *R. v. Spilsbury*, 7 C. & P. 187, 32 E. C. L., Coleridge, J., said, "It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that, if received, it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such a

¹ It is necessary for the State to show distinctly that the deceased's opinion was that he would not recover, or the declaration cannot be admitted. *Walker v. State*, 52 Ala. 192. *People v. Taylor*, 59 Cal. 640. A reply: "It is hard for me to say," in answer to the question, Have you any hope of recovery? renders a dying declaration inadmissible. *People v. Evans*, 4 N. Y. Crim. Rep. 218; see *People v. Sweeney*, Id. 275.

state as to render the evidence clearly admissible. It appears from the evidence that the deceased said he thought he should not recover as he was very ill. Now people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow purporting that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed he was convinced that his death was at hand. As nothing of this sort appears, I think there is not sufficient proof that he was without any hope of recovery, and that I, therefore, ought to reject the evidence." In *R. v. Perkins*, 9 C. & P. 395, 38 E. C. L.; 2 Moo. C. C. 135, a boy between *ten and eleven years of age was severely wounded by a gun [*36 loaded with shot, and died the next morning. On the evening of the day upon which he was wounded, he was seen by two surgeons. One of them, who was then of opinion that he could not survive many days, said to him, "My good boy, you must know you are now laboring under a severe injury, from which, in all probability, you will not recover, and the effects of it will most likely kill you." The other surgeon told him, "You may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning." The boy made no reply, but his countenance changed and he appeared distressed. From questions put to him, he seemed fully aware that he would be punished hereafter if he said what was untrue. He then made a statement to the surgeons. All the judges, except Bosanquet, Patterson, Coleridge, JJ., thought the statements made under the apprehension and expectation of immediate death. In *R. v. Megson*, 9 C. & P. 413, 38 E. C. L., two days before the death of the deceased, the surgeon told her she was in a very precarious state. On the following day, being much worse, she said to him that she had been in hopes of getting better, but as she was getting worse, she thought it her duty to mention what had taken place. She then proceeded to make a statement. Rolfe, B., held that this statement was not admissible, as it did not sufficiently appear that, at the time of making it, the deceased was without hope of recovery. In *R. v. Howell*, 1 Den. C. C. 1, the deceased had received a gunshot wound, and repeatedly expressed his conviction that he was mortally wounded. He was a Roman Catholic, and an offer was made to fetch a priest, which he declined. This was insisted on as showing either that the deceased had no sense of religion, or that he did not expect immediate death; but the judges, upon a case reserved, were unanimously of opinion that the evidence was properly received. In *R. v. Reaney*, Dears. & B. C. C. 151, the prisoner, eleven days before his death, signed a statement concluding with the words, "I have made this statement believing I shall not recover." On the same day he said, "I have seen the surgeon to-day, and he has given me some little hope that I

am better, but I do not myself think that I shall ultimately recover." The evidence was received by Willes, J., the point being reserved for the consideration of the Court of Criminal Appeal. All the judges present (Pollock, C. B., Wightman and Willes, JJ., Martin and Watson, BB.) were of opinion that the evidence was properly received. Much reliance was placed by the counsel for the prisoner on the word "ultimately," but Pollock, C. B., said, "No doubt, in order to render the statement admissible in evidence as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death, but there is no case to show that such apprehension must be of death in a certain number of hours or days. The question turns rather upon the state of the person's mind at the time of making the declaration, than upon the interval between the declaration and the death." Wightman, J., said that the statement must be made under an impression "that death must in a comparatively short lapse of time ensue." Martin, B., thought the question one for the judges at the trial exclusively, and not for the Court of Appeal, but that opinion stands alone. The case is also reported in 26 L. J., M. C. 143, and more fully in 7 Cox, Cr. Ca. 209, and there are some important discrepancies between the reports, but on the whole there does not seem to be any alteration of the law, *37] *as it previously stood, arising out of this case. Willes, J., in both the two last-mentioned reports, is said to have expressed his opinion that the deceased could not, consistently with the expression he used, have supposed that he was about to linger a long time. There must be, said Lush, "a settled hopeless expectation of *immediate* death." *R. v. Osman*, 15 Cox, C. C. 1. Erle, C. J., refused to infer from the nature of the wound alone (a gun-shot through the body), that a man must have known as soon as he had received it that he was about to die. *R. v. Cleary*, 2 F. & F. 851. It would seem, however, that in some circumstances it may be conceived possible to draw such an inference. *R. v. Morgan*, 14 Cox, C. C. 337; *R. v. Bedingfield*, 14 Cox, C. C. 341. In *R. v. Pickersgill*, Leeds Summer Assizes, 1869; the deceased, who was suffering from the effects of poison and died the same night, said: "I am getting worse. I am going to die." The doctor asked her if she thought she should get better, and she said, "No, I shall die." Cleasby, B., after consulting Brett, J., said the "evidence satisfied them that the woman was in a dying state, and that she believed it. When she said she was going to die, she meant that death was imminent." In *R. v. Bernadotti*, 11 Cox, C. C. 316, where the deceased had received a knife-stab in the neck, and the bleeding having been stopped, had re-commenced, so that his life was in danger, though not in immediate danger, and a magistrate was sent for, the deceased said, "Be quick or I shall die," just before making the declaration. Brett, J., after consulting Lush, J., admitted the deposition. See also *R. v. Jenkins*, L. R. 1 C. C. R. 187; 38 L. J., M. C. 82. Where a woman who had received severe injuries was standing at a neighbor's door fainting and apparently dying, and she said, "I'm dying; look to my children," and she died in the course of

the night, Hawkins, J., after consulting Baggallay, L. J., admitted her dying declaration. *R. v. Goddard*, 15 Cox, C. C. 7.

The question is, what was the belief of the person making the declaration at the time of making it, and it is immaterial that such person afterwards took a more hopeful view of his condition. *R. v. Hubbard*, 14 Cox, C. C. 565.

Interval of time between the declaration and death. With respect to the interval of time which may have elapsed between the uttering of the dying declarations and the moment of death, it is clear that, if the impression exists in the mind of the declarant that dissolution is shortly impending, it will not make any difference that death does not in fact take place until some time afterwards; 1 Phill. Ev. 245, 10th ed.; 3 Russ. on Cri. 556, 5th ed.; nor does there appear to be any case in which the evidence has been rejected on this ground. In most of the reported cases, however, the statements have been made within a few days of death actually taking place, and in most cases within a few hours. In the case of *R. v. Bernadotti*, however (cited *supra*), the deceased did not die until three weeks after making the declaration.¹

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¹The interval of five or six days between the declarations and the death of the party is not of itself sufficient to exclude them. *State v. Center*, 5 Vt. 378. Declarations made by a deceased person when he believed that he should not recover may be admitted in evidence, although he lived seventeen days after making them. *Commonwealth v. Cooper*, 5 Allen, 495. See also, *State v. Moody*, 2 Hayw. 31; *State v. Poll*, 1 Hawke, 442; *Montgomery v. State*, 11 O. 424; *State v. Tilghman*, 11 Ired. 513. *S. Swisher v. Commonwealth*, 26 Grat. (Va.) 963; *Dumas v. State*, 65 Ga. 471.

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But their weight and credibility when admitted are wholly for the jury. *Campbell v. State*, 38 Ark. 498. The court is to decide as to the admissibility of the declarations. It is error to admit them without a full investigation of the circumstances. *Owens v. State*, 59 Miss. 547. When the court is satisfied of their admissibility, they must be received and the jury must consider their weight with the other evidence. *Kilgore v. State*, 74 Ala. 1; *Battle v. State*, 74 Ga. 101. Where they have been admitted without objection, and subsequently evidence of the insanity of the deceased has been introduced, it is not error for the court to leave the question of sanity to the jury. *Bolin v. State*, 9 Lea, (Tenn.) 516.

held that, if a dying declaration have been reduced into writing, and signed by the deceased, secondary evidence cannot be given of its contents; *Per Coleridge, J., R. v. Gay*, 7 C. & P. 230, 32 E. C. L. But mere notes of the declaration taken down by one of the parties who were present would not be even admissible. See *supra*, p. 4.¹

Dying declarations—degree of credit to be given to. With respect to the effect of dying declarations, it is to be observed that, although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed, that animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. See *R. v. Crockett*, 4 C. & P. 544, *ante*, p. 34, 19 E. C. L., where the declaration was, "that damned man has poisoned me," which may be presumed to be vindictive; and *R. v. Bonner*, 6 C. & P. 386, 25 E. C. L., where the dying declaration was distinctly proved to be incorrect. Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; especially when it is considered that they cannot be subjected to the power of cross-examination; a power quite as necessary for securing the truth as the religious obligation of an oath can be. The security, also, which courts of justice have in ordinary cases for enforcing truth, by the terror of punishment and the penalties of perjury, cannot exist in this case. The remark before made on verbal statements which have been heard and reported by witnesses applies equally to dying declarations; namely, that they are liable to be misunderstood and misreported, from inattention, from misunderstanding,

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or from infirmity of memory.¹ In one of the latest cases upon the subject, the species of proof is spoken of as an anomaly, and contrary to all the general rules of evidence, yet as having, where it is received, the greatest weight with juries. Per Coleridge, J., *R. v. Spilsbury*, 7 C. & P. 196, 32 E. C. L.; 1 Phill. Ev. 251, 10th ed. "When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are, nevertheless, open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination." Per Alderson, B., *R. v. Ashton*, 2 Lewin, C. C. 147. See also the remarks of Pollock, C. B., to the same effect in delivering the judgment of the Court of Criminal Appeal in *R. v. Reaney*, *supra*, p. 36.

Dying declarations—evidence in answer to proof of. Dying declarations are, of course, open to direct contradiction in the same manner as any other part of the case for the prosecution; and as a prisoner is at liberty to show that a prosecutor who appears in court against him is not to be believed upon his oath (*see post*), he seems to be equally at liberty to prove that the character of the deceased was such that no reliance is to be placed on his dying declarations. 3 Russ. on Cri. 361, 5th ed. As the declarations of a dying man are admitted on a supposition that, in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows that the party against whom they are produced in evidence may enter into the particulars of his state of mind and of his behavior in his last moments, and may be allowed to show that the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution. See 1 Phill. Ev. 242, 10th ed.²

¹ The substance of dying declarations may be proved. It need not be the exact words. *Ward v. State*, 8 Black. 101; *Montgomery v. State*, 11 Stant. 424. [Verbal evidence of the dying declarations of the deceased is admissible. *State v. Somnier*, 33 La. An. 237; *Roberts v. State*, 5 Tex. App. 141. Even when the copy reduced to writing by a magistrate is in the custody of the court. *Kelly v. State*, 52 Ala. 361.] When the declaration is not of facts known to the deceased, but of an opinion or suspicion, as an inference from other facts, the jury should disregard it as evidence in itself. *State v. Arnold*, 13 Ired. 184; *Nelms v. State*, 13 Smed. & M. 500. S.

² *State v. Elliot*, 45 Ia. 486. So the prisoner may show conflicting declarations made by deceased. *Battle v. State*, 74 Ga. 101.

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a temporal nature coming from a person in authority are sufficient to exclude a confession, seems to have been considered by the judges, and by some, at least, to have been resolved in the negative.

*46] *On the whole the authorities seem to be in favor of the proposition that the inducement must be of a temporal nature. Whether or no it must have reference to the charge, has scarcely been fully discussed. It is certainly possible to conceive cases in which a much stronger inducement might be held out to a prisoner than one having reference to an escape from a charge not involving any very serious consequences.

Inducement held out with reference to a different charge. An inducement held out to a prisoner with reference to one charge will not exclude a confession of another offence, of which the prisoner was not suspected at the time the inducement was held out. The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf, that one of them had improperly induced him to confess, and this constable was called and stated that whilst the prisoner was in his custody on another charge, and when he was not suspected of the offence for which he was then on his trial, he had made a statement in which he confessed himself guilty of a second charge. It was submitted, that if a promise was held out to him, it was immaterial what the charge was. *Littledale, J.*, said, "I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge." The confession was admitted. *R. v. Warner*, Glouc. Spr. Ass. 1832, 3 Russ. on Cri. 452, 5th ed. But where a threat was held out to a prisoner without the nature of the charge being stated, but subsequently the nature of the charge was stated, and thereupon a confession was made, it was held to be inadmissible. *R. v. Luckhurst*, 1 Dears. C. C. R. 245.

Inducement must be held out by a person in authority. In *R. v. Spencer*, 7 C. & P. 776, 32 E. C. L., *Parke, B.*, stated that there was a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, can be given in evidence; and the learned judge intended, had the evidence been pressed, to have received it, and to have reserved the point. But on the last-mentioned case being cited, in *R. v. Taylor*, 8 C. & P. 733, 34 E. C. L., *Patteson, J.*, said, "It is the opinion of the judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority." And in *R. v. Moore*, 2 Den. C. C. 526, *Parke, B.*, in delivering a carefully considered judgment of the Court of Criminal Appeal, said that, if the inducement was not held out by a person in authority, it was clearly admissible. This question may, therefore, be considered as settled.¹

¹ When a magistrate on the examination of a prisoner accused of robbing an individual of a watch on the previous night, and on whom the watch was found, told him

Who is a person in authority. The decisions are numerous and undoubted that the prosecutor, or the person who in the ordinary

"that unless he could account for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing it;" it was held that this did not amount to such a threat as would prevent the introduction of the subsequent confession of the accused, especially as the magistrate repeatedly warned him not to commit himself by any confession. *State v. Cowen*, 7 Ired. 239. It is no ground for the exclusion of a confession as evidence against a prisoner, that it was made to an officer who had the prisoner in custody, provided that it was not drawn out by improper advantages taken of the situation in which the prisoner was standing. *Commonwealth v. Mosler*, 4 Pa. St. 264; *State v. Kirby*, 1 Strob. 318. [*State v. Carlisle*, 57 Mo. 102; *State v. Patterson*, 73 Mo. 695.] The competency of confessions cannot be questioned because they were made while the party was in legal imprisonment. *Stephen v. State*, 11 Ga. 225; *State v. Jefferson*, 8 Ired. 305; *People v. McMahan*, 2 Park. C. R. 663. [Under the Texan code, whoever seizes a thief is an officer *de facto*, and a confession made to him is as if made to an officer. *Smith v. State*, 13 Tex. App. 507. But see *Stato v. Von Sachs*, 30 La. An. Pt. II, 942. *Speer v. State*, 4 Tex. App. 474.] The single fact that a prisoner was in custody when his confessions were made, whether to the officer or to third persons, will not exclude the evidence of his declarations, in the absence of any promises, inducements, or threats. *People v. Rogers*, 54 Pa. St. 9; *Cobb v. State*, 27 Ga. 648. [*Commonwealth v. Smith*, 119 Mass. 105; *State v. McLaughlin*, 44 Ia. 87. But see *Neiderluck v. State*, 21 Tex. App. 320. Nor the mere fact that the defendant believed himself suspected and in danger of prosecution. *Allen v. State*, 12 Tex. App. 190.] A party cannot be compelled to give evidence against himself, and this protection holds as well against a threat of violence by private individuals as to force exercised by government officers to procure a confession of guilt; and evidence thus procured cannot be admitted against the accused. *Jordan v. State*, 32 Miss. 382. [But see *State v. Graham*, 74 N. C. 646.] When, after due warning of all the consequences and sufficient time allowed for reflection, a prisoner makes a confession of his guilt to a private person having nothing to do with the prisoner or prosecutor, although he may have influence and ability to aid him, such confession is evidence. *State v. Kirby*, 1 Strob. 155. A mere observation to the accused by the person who had her in custody "that in the long run, it would be better for her to tell the truth about the matter and not any lies," was held not enough to exclude a confession made afterwards in a conversation with a third person. *Hawkins v. State*, 7 Mo. 190. *State v. Vaigneur*, 5 Rich. 391; *Deathridge v. State*, 1 Sneed, 75; *Jane v. Commonwealth*, 2 Met. (Ky.) 30.

As to the admissibility of confessions made before magistrate's or coroner's inquests by parties accused: See *State v. Young*, 1 Winst. 126; *State v. Marshall*, 36 Mo. 400; *State v. Gilman*, 51 Me. 206; *State v. Matthews*, 66 N. C. 106; *Teachout v. People*, 41 N. Y. 7. [*State v. Spiers*, 86 N. C. 600. *Wolf v. Commonwealth*, 30 Grattan, (Va.) 833.]

Statements made in the presence of one under arrest on a criminal charge to which the prisoner makes no reply, are not admissible against him. *Commonwealth v. Walker*, 13 Allen, 570; *Commonwealth v. Curtis*, 97 Mass. 574; *People v. McCrea*, 32 Cal. 98. [But see *People v. Estrado*, 49 Cal. 171.] Although the testimony of a prisoner charged with murder was taken in writing before the coroner's jury, her oral confessions at other times are competent evidence. *Commonwealth v. Dower*, 4 Allen, 297. Voluntary confessions, whether made to private individuals or persons in authority, are admissible. *State v. Simon*, 15 La. An. 568. [*State v. Bruce*, 33 La. An. 186.] The notes of testimony taken by a magistrate, on the trial of a criminal charge, and not read over to or signed by the witness, are not competent evidence. *Schoonoon v. Myers*, 28 Ill. 308. No objection that confessions were made to a policeman, especially if the prisoner was not then in his custody. *People v. Wentz*, 37 New York, 303; *King v. State*, 40 Ala. 314; *Wiley v. State*, 3 Cold. 362. [But see *Grosse v. State*, 11 Tex. App. 364.] The evidence drawn out upon examination by a committing magistrate of a prisoner under oath as to the subject-matter of his offence is, *it seems*, incompetent. *Commonwealth v. Harman*, 4 Barr, 269. In that case, however, the magistrate had said to the prisoner, "If you do not tell the truth I will commit you," which was held to be an improper threat, sufficient to exclude the confession, and one subsequently made to the constable. *Id.* C. J. Gibson, however, says, "The administering of an oath by the magistrate under such circumstances, was a gross outrage upon the accused; any information drawn by it or subsequently given

course of things will become so, the constable in charge of the prisoner, and any person having judicial authority over the prisoner, are persons in authority within the meaning of the rule. The rule also extends to the master or mistress of a prisoner, but only where the offence concerns the master or mistress. This was decided in *R. v. Moore*, *supra*, where the prisoner was charged with killing or concealing the birth of her infant child, and had made a confession to *47] her mistress after an inducement, which was held admissible. The previous cases were there discussed by Parke, B., and shown to be in conformity with that decision. In *R. v. Luckhurst*, 1 Dears. C. C. 245, the owner of a mare was held to be a person from whom a threat coming would exclude the confession of a prisoner that he had had connection with the mare. In *R. v. Kingston*, 4 C. & P. 387, 19 E. C. L., Park, J., after conferring with Littledale, J., held that an inducement held out by a surgeon was sufficient to exclude a confession. This appears to be the only decision on this point. In *R. v. Garner*, 2 C. & K. 920, 61 E. C. L., the inducement was held out by the surgeon, and the confession was made to him, but the master and mistress were present, and, as will be seen presently, that is the same as if the inducement had been held out by them. The case of *R. v. Gilham*, 1 Moo. C. C. 86, is no authority, as has sometimes been stated, that the chaplain of a gaol is a person in authority within the meaning of this rule; see that case fully stated, *ante*, p. 45. In *R. v. Sleeman*, 1 Dears. C. C. 249, *ante*, p. 43, it was said that the daughter of the master of the house who had the maid-servant in her custody, for a temporary purpose, was not a person in authority. *Sed. qu.*; the point was not necessary to the decision, as it was held that there was no inducement. The wife of a sergeant of police who was employed at the gaol as searcher only, for which she received regular wages, was held to be a person in authority. *R. v. Windsor* and another, 4 F. & F. 360.

Inasmuch as in cases of felony any person may, upon reasonable suspicion, apprehend the suspected party, it follows that a person in no way connected with the charge may put himself in the position of a person in authority. Thus in *R. v. Parratt*, 4 C. & P. 570, 19 E. C. L., the prisoner, a sailor, was charged with robbing one of the crew of the ship to which he belonged. The master said, "If you do not tell me who your partner was, I will commit you to prison;" and the prisoner thereupon confessed. Alderson, B., held the confession inadmissible. Parke, B., referring to this case in *R. v. Moore*, 2 Den. C. C. 526, puts it on the ground that the master had threatened to take part in the prosecution for the felony.

It is the same thing whether the inducement be held out by a person

on its basis, is inadmissible." *Id.*; *State v. Broughton*, 7 Ired. 96; *People v. McMahon*, 51 Pa. St. 384. It is no objection that the confession was under oath. *People v. Hendrickson*, 1 Parker's C. R. 406. [*Contra*, *State v. Garvey*, 25 La. An. 191.] The statements of a prisoner, made under oath before a coroner's jury, before it was known that a murder had been committed, and before such prisoner had been charged with the crime, are admissible in evidence against him on trial for the murder. *Hendrickson v. People*, 6 Seld. 13. *S. Clough v. State*, 7 Neb. 320.

in authority or by another in his presence ; *R. v. Luckhurst*, 1 Dears. C. C. 145. And it appears from this case, from *R. v. Laughner*, 2 C. & K. 225, 61 E. C. L., and *R. v. Garner*, Id. 920 ; 1 Den. C. C. 329, that, even if the person in authority be silent, he will be presumed to acquiesce in the inducement.

Where there were three prisoners in custody on the same charge, and one said to another, "Well, John, you had better tell Mr. Walker (the prosecutor) the truth," and the prisoner addressed thereupon made a confession : evidence of this confession was received, and its admissibility reserved for the consideration of the Court of Criminal Appeal : that court affirmed the conviction. No counsel appeared, and no reasons were given ; but probably it was thought that though what is said in the presence of a person in authority may generally be considered as said with his sanction, yet that this did not apply to what was said by one prisoner to another ; as it could hardly be imagined that what was thus said was sanctioned by the person in authority. *R. v. Parker*, L. & C. 42.

Inducement by offer of pardon from the crown. The mere knowledge *by a prisoner of a handbill, by which a government reward and a promise of pardon are held out to any accomplice, [*48 does not furnish sufficient grounds for rejecting the confession of a prisoner. But where it was shown that the prisoner had asked to see any handbill that might appear, and one was accordingly shown him, in which a promise of pardon was held out to an accomplice, upon which the prisoner said he saw no reason why he should suffer for the crime of another, and that, as government had offered a free pardon to any one of the parties concerned who had not struck the blow, he would tell all about the matter, and accordingly did so, *Cresswell, J.*, held the confession inadmissible, as it was sufficiently clear that the prisoner was influenced by the offer of pardon. *R. v. Boswell*, 1 Car. & M. 584, 41 E. C. L.¹ In *R. v. Blackburn*, 6 Cox, Cr. Ca. 334, a statement made by the prisoner in a room, in which a large printed handbill, containing an offer of reward and pardon, was hanging up, was rejected by *Talfourd, J.*, after consulting with *Williams, J.*, the prisoner appearing to have the notion that he would be admitted as witness for the crown. In *R. v. Dingley*, 1 C. & K. 637, 47 E. C. L., the prisoner asked the chaplain of the gaol if any offer of pardon had been made ; the chaplain said there had, but added that, if the prisoner made a statement he hoped he would understand that he (the chaplain) could offer him no inducement, as it must be his own free and voluntary act. The prisoner afterwards signed a confession before a justice, in which he distinctly stated that no person had made any promise, or held out any inducement to him to confess anything. *Pollock, C. B.*, held that the confession was admissible. As to those cases in which the prisoner has given evidence on another charge, and has subsequently refused to repeat his evidence, and has then himself been put upon his trial, see *post* "Incompetency of Witnesses."

¹ *People v. Kurts*, 42 Hun, (N. Y.) 335.

Inducement—where held to have ceased. Although a confession made under the influence of a promise or threat is inadmissible, there are yet many cases in which it has been held that, notwithstanding such threat or promise may have been made use of, the confession is to be received, if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence upon the mind of the party.

Thus, if the impression that a confession is likely to benefit him has been removed from the mind of the prisoner, what he says will be evidence against him, although he has been obliged to confess. Where the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances was held by Mr. Justice Bayley to be clearly admissible. *R. v. Lingate*, 1815; 1 Phill. Ev. 414, 10th ed. So where it appeared that a constable told a prisoner he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would be any benefit to him to confess, on which the magistrate said, he would not say it would; the prisoner having afterwards, on his way to prison, made a confession to another constable, and, again, in prison, to another magistrate; the judges unanimously held that the confessions were admissible in evidence, on the ground that the

*49] *magistrate's answer was sufficient to efface any expectation which the constable might have raised. *R. v. Rosier*, East. T. 1821; 1 Phill. Ev. 414, 10th ed. A prisoner charged with murder was visited by a magistrate, who told him that, if he was not the man who struck the fatal blow, he would use all his endeavors and influence to prevent any ill consequences from falling on him, if he would disclose what he knew of the murder. The magistrate wrote to the secretary of state, who returned answer, that mercy could not be extended to the prisoner; which answer was communicated to the prisoner, who afterwards sent for the coroner, and desired to make a statement to him. The coroner cautioned him, and added that no hopes or promise of pardon could be held out to him. Littledale, J., ruled that a confession subsequently made by the prisoner to the coroner was admissible; for that the caution given by the latter must be taken to have completely put an end to all the hopes that had been held out. *R. v. Clewes*, 4 C. & P. 224, 19 E. C. L. See also *R. v. Howes*, 6 C. & P. 404, 25 E. C. L. A girl charged with poisoning was told by her mistress, that, if she did not tell all about it that night, the constable would be sent for next morning to take her to S. (meaning before the magistrate there); upon which the prisoner made a statement. The next morning a constable was sent for, who took the prisoner into custody, and on the way to the magistrate, without any inducement from the constable, she confessed to him. Bosanquet, J., said, "I think this statement receivable. The inducement was, that if she confessed that night the constable would not be sent for, and she would not be

taken before the magistrates. Now she must have known when she made this statement, that the constable was taking her to the magistrates. The inducement therefore was at an end." *R. v. Richards*, 5 C. & P. 318, 24 E. C. L.

Inducement—where held not to have ceased. It is said by Mr. Justice Buller that there must be very strong evidence of an explicit warning not to rely on any expected favor, and that it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession can be given in evidence, 2 East, P. C. 658. In the following case the warning was not considered sufficient. A confession having been improperly obtained, by giving the prisoner two glasses of gin, the officer to whom it had been made read it over to the prisoner before a magistrate, who told the prisoner that the offence imputed to him affected his life, and that a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the papers. Best, J., considered the second confession, as well as the first, inadmissible; and said, that had the magistrate known that the officer had given the prisoner gin, he would, no doubt, have told the prisoner, that what he had already said could not be given in evidence against him; and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would have been evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate. *R. v. Sexton*, Chetw. Burn. Just. tit. Confessions, *ante*, p. 45. So where the committing magistrate told the prisoner, that, if he would make a confession, he would do all he could for him, and no confession was *then made, but, after his committal, the prisoner made a state-
ment to the turnkey, who held out no inducement and gave no [50
caution; Park, J., said he thought the evidence ought not to be received after what the committing magistrate had said to the prisoner, more especially as the turnkey had not given any caution. *R. v. Cooper*, 5 C. & P. 525, 24 E. C. L.

A prisoner had made a confession to one of the prosecutors in a charge of larceny, which, it was admitted, could not be received in evidence, on account of what had passed between the prisoner and a constable who had her in charge. In the afternoon of the same day another of the prosecutors went to the prisoner's house and entered into conversation with her about the stolen property, when she repeated the confession she had made in the morning, but no promise or menace was on this occasion held out to her. Taunton, J., said that the second confession was not receivable, it being impossible to say, that it was not induced by the promise which the constable made to the prisoner in the morning. *R. v. Meynell*, 2 Lewin, C. C. 122.

The prisoner, who was indicted for murder, worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place.

Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own, and added, that there was no doubt he would be found guilty; it would be better for him if he would confess. A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, "Robert, do not make him any promises." The prisoner then made a confession. Patteson, J., on the evidence being tendered, said, "That will not do. The constable ought to have done something to remove the impression from the prisoner's mind." It was then further proved that the overlooker, in about ten minutes after the above confession, delivered the prisoner to another constable, and that, when the latter received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. This constable took the prisoner to his house, and there said, "I believe Sherrington has murdered a man in a brutal manner." The wife and brother of the prisoner were there, and they said to the prisoner, "What made thee go near the cabin?" The prisoner in answer made a statement similar in effect to the one he had made before. The constable used neither promise nor threat to induce the prisoner to say anything, but did not caution him, and it was not more than five minutes after he had received the prisoner into his charge, that the prisoner made the statement. The constable was not aware that the overlooker had held out any inducement, and the overlooker was not present when the statement was made. Patteson, J., rejected the second confession, saying, "There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received. I am of opinion in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination." *R. v. Sherrington*, 2 Lewin, C. C. 123. A female servant being suspected of stealing money, her mistress, on a Monday, told her that she would forgive her if she told her the truth. *51] *On the Tuesday, she was taken before a magistrate, and, no one appearing against her, was discharged. On the Wednesday, being again apprehended, the superintendent of the police went with her mistress to the Bridewell, and told her, in the presence of her mistress, that she "was not bound to say anything unless she liked; and that if she had anything to say, her mistress would hear her," but (not knowing that her mistress had promised to forgive her) he did not tell her, that if she made a statement it might be given in evidence against her. The prisoner then made a statement. Patteson, J., held that this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement; but that if the mistress had not been then present, it might have been otherwise. *R. v. Hewitt*, 1 Car. & M. 534, 41 E. C. L.¹ See also, *R. v. Rue*, 13 Cox, C. C. 209.

¹ *Moore v. Commonwealth*, 2 Leigh, 701. The presumption is that the influence of the threats or promises continues. *State v. Guild*, 5 Halst. 163; *Case of Bownhas et*

Confessions obtained by artifice, or deception, admissible. Where a confession has been obtained by artifice or deception, but without the use of promises or threats, it is admissible. Thus it has been held, that it is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody, and even though some artifice has been used to draw him into that supposition. *R. v. Burley*, East. T. 1818; 1 Phill. Ev. 413, 10th ed. Where a prisoner asked the turnkey if he would put a letter in the post, and, on receiving a promise that he would do so, gave him the letter, which was detained by the turnkey and given in evidence as a confession at the trial; *Garrow, B.*, received the evidence. *R. v. Der- rington*, 2 C. & P. 418, 12 E. C. L. So where a person took an oath that he would not mention what the prisoner told him; *R. v. Shaw*, 6 C. & P. 373, 25 E. C. L.; and where a witness promised that what the prisoner said should go no further; *R. v. Thomas*, 7 C. & P. 345, 32 E. C. L. It appeared that one of the prisoners had made a state-

al., 4 Rog. Rec. 136; *Case of Stage et al.*, 5 Id. 177; *Case of Milligan et al.*, 6 Id. 69. [*State v. Wintzengerode*, 9 Ore. 153. The burden is on the State to show that these influences are gone. *Owen v. State*, 78 Ala. 425.] On the trial of an indictment for larceny it appeared that the owner of the goods, on the prisoner's expressing contrition for the offence, promised not to prosecute him; but the officer whom they soon met told them the matter could not be settled, and immediately arrested the prisoner. *Held*, that the prisoner's confessions, made afterwards, were admissible in evidence against him, notwithstanding the previous promise of the owner. *Ward v. People*, 3 Hill, 395. [*Commonwealth v. Cullen*, 111 Mass. 435; *Commonwealth v. Howe*, 132 Mass. 250.] Confessions made by a prisoner after threats and promises have ceased to operate, are admissible in evidence. *Peters v. State*, 4 Smed. & M. 31. [*State v. Frazier*, 6 Baxter, (Tenn.) 539.] But the presumption is that the threats and promises continued to operate until the contrary appears. *Id.*; *State v. Roberts*, 1 Dev. 259. When threats have been made to the defendant and subsequently, without being previously cautioned, he makes confessions, they are not admissible. *Peters v. State*, 4 Smed. & M. 31; *Van Buren v. State*, 24 Miss. 572. The presumption is that the influence of the threats continues and such presumption must be overcome. *Id.*; *Commonwealth v. Knapp*, 10 Pick. 477; *State v. Roberts*, 1 Dev. 259; *State v. Gould*, 5 Halst. 163; *Commonwealth v. Harman*, 4 Barr, 269; *Whaly v. State*, 11 Ga. 123; *Commonwealth v. Taylor*, 5 Cush. 505; *Conley v. State*, 12 Mo. 462; *State v. Hash*, 12 La. An. 895; *State v. Fisher*, 6 Jones' L. 478; *Simon v. State*, 36 Miss. 636. [*State v. Chambers*, 39 Ia. 179; *State v. Jones*, 54 Mo. 478.] Facts, the knowledge of which is derived from an inadmissible confession, may themselves be given in evidence. *Commonwealth v. Knapp*, 9 Pick. 496; *State v. Crank*, 2 Bail. 67; *Jackson's Case*, 1 Rog. Rec. 28; *Case of Stage et al.*, 5 Id. 177. When a confession in itself inadmissible leads to the ascertainment of a fact admissible and material in the case, so much of such confession as relates *strictly* to the fact may be received. *State v. Vaigneur*, 5 Rich. 391. [*State v. Garvey*, 23 La. An. 925; *People v. Parton*, 49 Cal. 632. But the confession must itself lead to the discovery of the facts. *Walker v. State*, 2 Tex. App. 326; *Clemons v. State*, 4 Lea, (Tenn.) 23; *Rhodes v. State*, 11 Tex. App. 563.] Upon a trial for murder so much of the prisoner's confession as led to the discovery of the remains of the person killed, is admissible in evidence, although his confession was made by persuasion and in the hope of immunity. *State v. Motley*, 7 Rich. 327. [*Compare Sampson v. State*, 54 Ala. 241; *State v. Mortimer*, 20 Kan. 93.] When property is stolen, and the prisoner shortly afterwards points out the place where it is concealed, he is bound to explain his knowledge and reconcile it with his innocence. *Hudson v. State*, 9 Yerg. 408.

See as to facts discovered by inadmissible confessions. *Duffy v. People*, 26 N. Y. 588; *People v. Ah Ki*, 20 Cal. 177; *Elizabeth v. State*, 27 Tex. 329; *Mountain v. State*, 40 Ala. 344; *People v. Hoy Yen*, 34 Cal. 176; *Selridge v. State*, 30 Tex. 60; *Greer v. State*, 31 Id. 129. S. *Strait v. State*, 43 Tex. 486; *Garrard v. State*, 50 Miss. 147.

ment to a constable in whose custody he was, but that he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so. On its being objected that what a prisoner said under such circumstances was not receivable in evidence, Coleridge, J., said, "I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible; it must either be obtained by hope or fear. This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury." *R. v. Spilsbury*, 7 C. & P. 187, 32 E. C. L.¹

Confessions obtained by questioning admissible. A confession is admissible in evidence where it has been elicited by questions put by a person in authority, *R. v. Thornton*, 1 Moo. C. C. 27, where the questions were put by the police constable to a boy fourteen years of age, and the prisoner was also treated with considerable harshness. Nor does it appear that it makes any difference that the questions put assume the guilt of the prisoner, *Id.* *Phill. Ev.* 10th ed. 421. In *R. v. Kerr*, 8 C. & P. 176, 34 E. C. L., Park, J., seemed to think that it might not be in some cases improper for a policeman to interrogate a prisoner, but the practice is reprobated by most of the judges; and in one case where it appeared that the constable was in the practice of interrogating prisoners in his custody, Patteson, J., threatened to cause him to be dismissed from his office. *R. v. Hill*, Liverpool Spring Assizes, 1838, MS.²

*52] ***Confessions obtained in the course of legal proceedings.** There is much contradiction in the older cases on the point whether confessions made in the course of legal proceedings, not having reference to the charge upon the prosecution of which they are sought to be used, are admissible. But the subject was fully considered in *R. v. Scott*, 25 L. J., M. C. 128; 7 Cox, C. C. 164; *Dears. & B. C. C.* 47; and the distinction pointed out.³ That was a case in which the prisoner had been examined in the Court of Bankruptcy, touching his trade, dealings, and estate, under the provisions of the 12 & 13 Vict. c. 106, s. 117 (repealed); and this examination was given in evidence on a criminal charge against the bankrupt of mutilating his trade books. The question whether such evidence was admissible was argued before the Court of Criminal Appeal, and it was admitted on all

¹ *State v. Phelps*, 74 Mo. 128; *Laros v. Commonwealth*, 84 Pa. St. 200; *Davis v. State*, 2 Tex. App. 588; *Berry v. State*, 4 Tex. App. 492. A statement of the defendant is not rendered inadmissible, because it was heard by the witness while eavesdropping. *People v. Cotta*, 49 Cal. 166.

² It is no objection that confessions are made in answer to leading questions. *Carrol v. State*, 23 Ala. 28; *State v. Kirby*, 1 Strob. 378. 8.

On the examination of the prisoner see Wharton's *Crim. Ev.*, 9th ed., § 666. The statutes upon this point vary in the different States of the Union. In North Carolina it has been held that the prisoner should be cautioned that silence would not be used against him. *State v. Roric*, 74 N. C. 148. See *People v. Kelly*, 47 Cal. 125. Upon the Texan Code as to confessions see *Speer v. State*, 4 Tex. App. 474; *Marshall v. State*, 5 Tex. App. 273; *Zumwalt v. State*, 5 Tex. App. 521; *Harris v. State*, 6 Tex. App. 97. For the rule in Georgia as to confessions offered in evidence see *Dawson v. State*, 59 Ga. 333.

³ See Wharton's *Crim. Ev.*, 9th ed., § 664, and notes. *Alston v. State*, 41 Tex. 39.

hands that, in ordinary cases, what is stated by a person in a lawful examination may be used in evidence against him. The main contention was, that inasmuch as by the Act it was compulsory upon the bankrupt to answer the questions put to him, whether they tended to criminate him or no, he ought not to be criminally prejudiced by such answers, otherwise the fundamental maxim, "*nemo tenetur seipsum accusare*," would be violated. In this view Coleridge, J., concurred; but all the other judges, Lord Campbell, C. J., Willes, J., Alderson and Bramwell, BB., thought that the evidence was admissible, and that the maxim relied on had been overruled by the legislature. And the same view of the law has been taken with respect to the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71. See *R. v. Hallam*, 12 Cox, C. C. 174; *R. v. Widdop*, L. R. 2 C. C. R. 3; 42 L. J., M. C. 9; *Ex parte Schofield*, 6 Ch. D. 230; 46 L. J. Bkcy. 112. A mere witness not the bankrupt is, however, entitled to protection. S. C. See *post*, Privilege of Witnesses.

Declarations accompanying the delivery of stolen property—whether admissible. Declarations accompanying an act done have been admitted in evidence. The prisoner was tried for stealing a guinea and two promissory notes. The prosecutor was proceeding to state an inadmissible confession, when Chambre, J., stopped him, but permitted him to prove that the prisoner brought to him a guinea and a 5*l.* Reading Bank note, *which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him*. The learned judge told the jury, that, notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note, accompanying the act of delivering it up, as evidence that it was the stolen note. A majority of the judges (seven) held the conviction right. Lawrence and LeBlanc, JJ., were of a contrary opinion, and LeBlanc said that the production of the money by the prisoner was alone admissible, and not that he said *it was one of the notes stolen*. *R. v. Griffin*, Russ. & Ry. 151. And see *R. v. Jones*, Russ. & Ry. 152, where the statement of the prisoner, on producing some money out of his pocket, that it was all he had left of it, was held inadmissible, the prosecutor having held out inducements to confess. Speaking of declarations accompanying an act, Mr. Phillips observes, "it may be thought that the only ground upon which such declarations can be received is, that they are explanatory of the act of delivery, and not a narrative of a past transaction," *Phill. Ev.* 432, 8th ed.

***Evidence only against the parties making them.** It is quite settled, generally, that a confession is only evidence [*53 against the party making it, and cannot be used against others. With respect to conspiracy, there is some obscurity on this subject, which will be found discussed in the chapter relating to that offence, *post*. But a difficulty occurs where a confession by one prisoner is given in evidence, which implicates the other prisoners by name, as to the propriety of suffering those names to be mentioned to the jury. Several

cases are collected in 1 Lewin, C. C. 107, which show that Littledale, J., Alderson, B., and Denman, C. J., considered that the whole of the confession, whether verbal or written, ought to be presented to the jury, not omitting the names; Parke, B., thought otherwise. See *R. v. Fletcher*, 4 C. & P. 250, 19 E. C. L., and *R. v. Clewes*, Id. 221, where Littledale, J., says, that he had formed his opinion after much consideration.¹

The confession of the principal is not admissible in evidence to prove his guilt, upon an indictment against the accessory. One Turner was indicted for receiving sixty sovereigns, etc., by one Sarah Rich, then lately before feloniously stolen. To establish the larceny by Rich, the counsel for the prosecution proposed to prove a confession by her, made before a magistrate in the presence of the prisoner, in which she stated various facts, implicating herself and others, as well as the prisoner. Patteson, J., refused to receive as evidence anything which

¹ *Morrison v. State*, 5 O. 539; *Lowe v. Boteler*, 4 H. & McH. 349. [*State v. Weasel*, 30 La. An., Part II, 919.] Therefore, on an indictment against A. for concealing a horse thief, it is not competent to give evidence of what the alleged horse thief has confessed in the presence of A., to establish the fact that a horse was stolen. *Lowe v. Boteler*, 4 H. & McH. 349; unless it be first established that they were partners in the guilty design. *American Fire Co. v. United States*, 2 Pet. 364; *Snyder v. Laframbois*, 1 Bre. 269; *Commonwealth v. Eberle et al.*, 3 S. & R. 9; *Wilbur v. Strickland*, 1 R. 458; *Reitenback v. Reitenback*, Id. 362. [*Commonwealth v. Ratcliffe*, 130 Mass. 36.] The court will not inquire into the credibility of the evidence which proves the conspiracy. *Commonwealth v. Crowninshield*, 10 Pick. 497. What is asserted in the presence of a party and not contradicted by him is evidence. *Batturs v. Sellers et al.*, 5 H. & J. 117; *Hendrickson v. Miller*, 4 Rep. Const. Ct. 300; *Commonwealth v. Call*, 21 Pick. 515. [But the confession of one of two persons jointly indicted, is not rendered admissible against the other because of his silence when said confession was made. *Commonwealth v. McDermott*, 123 Mass. 440.] Testimony delivered in another cause, to which the plaintiff was a party, cannot be given in evidence against him as a tacit confession of the facts sworn to, though it be shown that he heard the testimony and expressed no dissent; and this, notwithstanding the testimony was given by a witness called on his side. *Sheridan v. Smith et al.*, 2 Hill, 538. When a presentment for adultery is joint, the admission of one party is not evidence against the other. *Frost v. Commonwealth*, 9 B. Mon. 362. [*Gore v. State*, 58 Ala. 391.] And see *Hunter v. Commonwealth*, 7 Gratt. 641; *Malone v. State*, 8 Ga. 408; *Ake v. State*, 31 Tex. 416; *State v. Fuller*, 39 Vt. 74. S.

But where a declaration is admissible against one of two co-defendants, it is no ground for exclusion that it implicates the other. *State v. Brite*, 73 N. C. 26. Even by name. *State v. Dodson*, 16 S. C. 453. But the co-defendant cannot be convicted on such evidence. *Alsbrook v. State*, 52 Ala. 24. Where two or more persons are charged with having engaged in a common unlawful purpose, the declarations of one are not admissible in evidence against the others, when made after the completion of the unlawful purpose. *Phillips v. State*, 6 Tex. App. 364; *People v. English*, 52 Cal. 212; *State v. Hickman*, 75 Mo. 416; *State v. Jackson*, 29 La. An. 354; *State v. Duncan*, 64 Mo. 262; *People v. Moore*, 45 Cal. 19. But the mere flight of a conspirator, after performance of an overt act, will not render the declarations of his fellow-conspirators, made after he fled, inadmissible against him. *State v. Shields*, 45 Conn. 266; cf. *Blount v. State*, 49 Ala. 381. They are inadmissible in a trial for murder, where there is no evidence of a conspiracy, even when made before the crime was committed. *State v. Weaver*, 57 Ia. 730; *State v. Tulbot*, 73 Mo. 347; *People v. Stevens*, 47 Mich. 411. Where one is indicted for participation in an assault made by another, defendant's conversations in the nature of admissions are admissible in evidence upon his trial. *Commonwealth v. Keating*, 133 Mass. 572. Where two are jointly indicted, but are tried separately, if there is evidence to prove a conspiracy on the trial of one, evidence of a conversation between the other and a third person of the nature of a confession, is admissible. *People v. Cotta*, 49 Cal. 166.

was said by Sarah Rich respecting the prisoner, but admitted what she had said respecting herself. The prisoner was convicted. Having afterwards learned that a case had occurred before Mr. Baron Wood, at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty, and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty, to establish the fact of the stealing by the principal, as against the receiver, Patteson, J., thought it proper to refer to the judges the question, "Whether he was right in admitting the confession of Sarah Rich in the present case?" All the judges having met (except Lord Lyndhurst, C. B., and Taunton, J.), they were unanimously of opinion, that Sarah Rich's confession was no evidence against the prisoner, and the conviction was held wrong. *R. v. Turner, Moody*, C. C. 347. In *R. v. Cox*, 1 F. & F. 90, Crowder, J., admitted, on the trial of the receiver, the confession of the thief made in the receiver's presence as evidence of the fact of stealing. *Sed qu.* Where the counsel for the prosecution opened no case against one of two prisoners and was about to detail to the jury certain statements made by that prisoner, Pollock, C. B., interposed, saying that those statements ought not to be repeated merely because the prisoners were jointly charged, and that the proper course would be to take an acquittal, and examine such prisoner as a witness. *R. v. Gardner & Humbler*, 9 Cox, C. C. 332.

By agents. An admission by an agent is never evidence in criminal, as it is sometimes in civil, cases, in the sense in which an admission by a party himself is evidence. An admission by the party himself is in all cases the best evidence which can be produced, and supersedes the necessity of all further proof; and in civil cases the rule is carried still further, for the admission of an agent made in the course of his employment, and in accordance with his duty, is as binding upon the principal as an admission made by *himself. But this has [*54 never been extended to criminal cases. Thus, in order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to show that such letter was written in consequence of an interview, but it must be shown that it was written in pursuance of instructions of the client. *R. v. Downer*, 14 Cox, C. C. R. 486. Where a party is charged with the commission of an offence through the instrumentality of an agent, then it becomes necessary to prove the *acts* of the agent; and, in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced. Thus, on the impeachment of Lord Melville by the House of Lords, it was decided that a receipt given in the regular and official form by Mr. Douglas, who was proved to have been appointed by Lord Melville to be his attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money, and to give receipts for the same, and *who was dead*, was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster did receive from the ex-

chequer a certain sum of money in the ordinary course of business. 29 How. St. Tr. 746. Had, however, Mr. Douglas been alive at the time, there can be no doubt that he must have been called: and that he might have been called to prove the receipt of the money would probably not have been questioned. This case does not, therefore, as sometimes appears to have been thought, in any way touch upon the rules that the admission of an agent *does not* bind his principal in criminal cases, but merely shows that, where the acts of the agent have to be proved, those acts may be proved in the usual way.¹

Admissions by the prosecutor. It would seem doubtful whether in any case a prosecutor in an indictment is a party to the inquiry in such a sense as that an admission by him could be received in evidence to prove facts for the defence. Of course this does not refer to the admission of facts which would go to his reputation for credibility as a witness in the case; these may always and under all circumstances be proved by the admission of the witness himself. But any other fact necessary to the defence would have to be proved by the best available evidence, independently of any admission by the prosecutor. The Queen's Case, 2 Brod. & Bing. 297, 6 E. C. L., is sometimes quoted as bearing on this point. There the question asked of the judges, in abstract form, was, whether the admission of an agent of the prosecutor that he had offered a bribe to a witness who was *not* called could be given in evidence by the prisoner, for the purpose of discrediting generally those witnesses who were called; and the judges answered that it could not. No question of *admission* or *agency* was discussed, but the judges grounded their opinion on this, that no inference against the general credibility of the witnesses could be drawn from the evidence tendered, and that it was not, therefore, relevant to the issue.²

The whole of a confession must be taken together. In criminal, as well as in civil cases, the whole of an admission made by a party is to be given in evidence. The rule is thus laid down by Abbott, C. J., in The Queen's Case, 2 Brod. & Bing. 297, 6 E. C. L. If, on the

¹ Whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority is said or done by the principal, and may be proved as well in a criminal as a civil case, in all respects as if the principal were the actor and the speaker. *Cliquot v. Champagne*, 3 Wall. 114. The acts and assertions of one assuming to act as an agent do not bind the principal, without some evidence of the agent's authority, beyond his own assertion. *Hatch v. Squirea*, 11 Mich. 185; *Sencerbox v. McGrade*, 6 Minn. 484; *American Fire Co. v. United States*, 2 Pet. 364; *United States v. Morrow*, 4 Wash. C. C. 733. S.

Nor if made in the absence of the principal, even though the agent's authority be proved. *Lambert v. People*, 6 Abbott (N. Y.), N. Cas. 181.

² A prosecutor is one who prefers an accusation against a party. One who appears in response to a subpoena is not a prosecutor but only a witness. *State v. Millain*, 3 Nev. 409. S.

The rule of admission from silence applies to the prosecutor in criminal actions, when a statement is made by another in his presence. *State v. Burton*, 94 N. C. 947.

part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with the witness, be brought *forward, the defendant has a right to lay before the court the whole of what was said in that conversation; not only so much [*55 as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced on the previous examination, provided only that it relates to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. "There is no doubt," says Mr. Justice Bosanquet, "that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, for their consideration, precisely as in any other case where one part of the evidence is contradictory to another." *R. v. Jones*, 2 C. & P. 629, 12 E. C. L. Where a prisoner was indicted for larceny, and, in addition to evidence of the possession of the goods, the counsel for the prosecution put in the prisoner's statement before the magistrate, in which he asserted that he had bought the goods, Garrow, B., is reported to have directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together. But there is not the least doubt that a jury may believe that part which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing. Thus where, in addition to evidence of the stolen goods being found in the possession of the prisoner, the prosecutor put in the prisoner's examination, which merely stated that the "cloth was honestly bought and paid for," Mr. Justice J. Park told the jury, "If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if, from his selling it so very soon after it was lost, at the distance of eight miles, you feel satisfied that the statement of his buying it is all false, you will find him guilty." *R. v. Higgins*, 3 C. & P. 603, 14 E. C. L. So where a prisoner, charged with murder, stated in his confession that he was present at the murder, which was committed by another person, and that he took no part in it, Little-dale, J., left the confession to the jury, saying, "It must be taken all together, and it is evidence for the prisoner as well as against him; still the jury may, if they think proper, believe one part of it and disbelieve another." *R. v. Clewes*, 4 C. & P. 221, 19 E. C. L. See also *R. v. Steptoe*, 4 C. & P. 397, 19 E. C. L. In a trial for murder, the counsel for the prosecution said he would treat the statements of the prisoners before the magistrates as their defence, and show by evidence that they were not consistent with truth; *R. v. Greenacre*, 8 C.

& P. 36, 34 E. C. L.; and this course is frequently adopted in practice.¹

Confessions of matters void in point of law, or false in fact.
An admission on the part of a prisoner is not conclusive, and if it

¹ Unless its improbability renders it necessary that the defendant should prove what he asserts in avoidance of a conceded fact. *Newman v. Bradley*, 1 Dall. 340; *Farrel v. McClea*, Id. 392. The jury may believe part and disbelieve part. *Fox v. Lambson*, 3 Halst. 275; *Bank of Washington v. Barrington*, 2 Penn. 27; *Young v. State*, 2 Yerg. 292; *Kelsey v. Bush*, 2 Hill, 441. [*Riley v. State*, 4 Tex. App. 538; *Brown v. State*, 2 Tex. App. 139.] Yet such facts must be distinct and relate to different matters of fact. *Fox v. Lambson*, 2 Halst. 275; see *Hicks' Case*, 1 Rog. Rec. 66; *People v. Weeks*, 3 Wheel. C. C. 533. The rule does not exclude a confession where only part of what the defendant said has been overheard. *State v. Covington*, 2 Bail. 569. [*State v. Pratt*, 88 N. C. 639; *Commonwealth v. Pitsinger*, 110 Mass. 101. Nor where such admission discloses the commission of another crime. *State v. Underwood*, 75 Mo. 230.] If a prisoner in speaking of the testimony of one who had testified against him, says, that "what he said was true so far as he went, but he did not say all or enough;" this is not admissible as a confession, nor does it warrant proof to the jury of what the witness did swear to. *Finn v. Commonwealth*, 5 Rand. 701. A party whose admissions or confessions are resorted to as evidence against him, has in general a right to insist that the whole shall be taken together, but the part culled out by him should relate to the point or fact inquired into on the other side. *Kelsey v. Bush*, 2 Hill, 440. [See *People v. Penhallow*, 42 Hun, (N. Y.) 103.] When the declarations of the defendant are given in evidence, the jury ought to take the whole into consideration, and may reject those in his favor, and believe those operating against him. *Green v. State*, 13 Mo. 382; *Brown's Case*, 9 Leigh, 633; *Bower v. State*, 5 Mo. 364. When the prisoner's declarations have been adduced in evidence by the State, it is his right to have the entire conversation laid before the jury; yet it is not true that the declaration so adduced in evidence must be taken as true, if there was no other evidence in the case incompatible with it. *Corbett v. State*, 31 Ala. 329. [*Eil-and v. State*, 52 Ala. 322.] It is error to refuse to admit all that was said by a prisoner when a part of the conversation has been introduced as a confession. *Long v. State*, 22 Ga. 40; *People v. Navis*, 3 Cal. 106. [Counsel who has consented to allow proof of a conversation to be proved, cannot object to the residue on grounds which apply to the whole. *State v. McDonald*, 73 N. C. 346.] Where the oral admissions of a party are resorted to as evidence against him, the rule, as now established, permits the court and jury to believe that part of an admission, which charges the party who makes it, and to disbelieve that part which discharges, when the latter is improbable on its face or discredited by other testimony. *Roberts v. Gee*, 15 Barb. 449. The defendant is entitled to have the whole of his statement made at the same time; but the jury may believe part and disbelieve part. *State v. Mahan*, 32 Vt. 241; *People v. Wyman*, 15 Cal. 70. [*State v. Hollenscheit*, 61 Mo. 302; *McHenry v. State*, 40 Tex. 46.] When evidence has been introduced by the government in a criminal case to prove declarations of the defendant, he may prove by cross-examination, or by his own witnesses, what he said at the time referred to. *People v. Strong*, 30 Cal. 151; *State v. Worthington*, 64 N. C. 594; *Connor v. State*, 34 Tex. 659. [*State v. Brown*, 1 Mo. App. 86.] Where one part of a prisoner's confession would inculpate and another part exculpate him, a jury may, if the other evidence requires it, believe the inculpatory and reject the exculpatory matter. *Griswold v. State*, 24 Wis. 144. Confession inadmissible when interrupted and the prisoner prevented from saying all he wished to say. *Miller v. State*, 40 Ala. 50; *Crawford v. State*, 4 Cold. 190. [But where the confession is full and unqualified it is not inadmissible, because an interruption has prevented the defendant from adding something favorable to himself. *Levison v. State*, 54 Ala. 520.] Where a witness on a criminal trial who testifies to a confession made to him by the prisoner, did not understand all that the prisoner said to him, no part should be received. *People v. Gilbert*, 39 Cal. 653. 6.

A confession is also inadmissible if the witness does not remember the substance of all that was said at the time. *Berry v. Commonwealth*, 10 Bush, (Ky.) 15; *State v. Hughes*, 29 La. An. 514. But it is not inadmissible merely because the witness does not recollect the whole of the conversation. *Kendall v. State*, 65 Ala. 492; *State v. Pratt*, 83 N. C. 639; *Pond v. State*, 55 Ala. 196.

afterwards appear in evidence that the fact was otherwise, the admission will be of no weight.¹ Thus, upon an indictment for bigamy, where the prisoner had admitted the first marriage, and it appeared at *the trial that such marriage was void, for want of consent of the guardian of the woman, the prisoner was acquitted. 3 Stark. [*56 Ev. 894, 3d ed. So on an indictment for setting fire to a ship, with intent to injure two part-owners, it was held that the prosecutor could not make use of an admission by the prisoner that these persons were owners, if it appeared that the requisites of the shipping acts had not been complied with. *R. v. Philip*, 1 Moody, C. C. 271.

Confessions inferred from silence or demeanor. Besides the proof of direct confessions, the conduct or demeanor of a prisoner on being charged with the crime, or upon allusions being made to it, is frequently given in evidence against him. Thus, although neither the evidence nor the declaration of a wife is admissible against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer or an evasive reply, are receivable in evidence as an implied admission on his part. *R. v. Smithers*, 5 C. & P. 332, 24 E. C. L.; *R. v. Bartlett*, 7 C. & P. 832, 32 E. C. L. So evidence of a prisoner's demeanor on a former occasion is admissible to prove guilty knowledge. *R. v. Tater-shall*, and *R. v. Phillips*, *post*, p. 98. Mr. Phillipps, after remarking that a confession may in some cases be collected or inferred from the conduct and demeanor of a prisoner, on hearing a statement affecting himself adds, "As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great mis-construction, evidence of this description ought to be regarded with much caution." 1 Ph. & Arn. 405, 10th ed.

A deposition of a witness, or the examination of another prisoner taken before the committing magistrate, is not admissible in evidence merely because the party affected by it was present, and might have had an opportunity of cross-examining or commenting on the evidence; neither can any inference be drawn, as in other cases, from his silence. *R. v. Appleby*, 3 Stark. N. P. 33, 3 E. C. L.; *Melen v. Andrews*, M. & M. 336, 22 E. C. L.; *R. v. Turner*, 1 Moody, C. C. 347; *R. v. Swinnerton*, 1 Car. & M., 593, *post*, p. 66, 41 E. C. L.²

¹ *State v. Welsh*, 7 Porter, 463; *Alton v. Gilmanton*, 2 N. H. 520. S.

² Letters addressed to a party and found in his possession, are not evidence against him of the matters therein stated, unless the contents have been adopted or sanctioned by some reply or statement or act done on his part, and shown by other proof. *Commonwealth v. Eastman*, 1 Cush. 189. [*Dana v. McBride*, 43 Ia. 624; *Underwood v. Linton*, 54 Ind. 468. So no admission can be inferred from silence when such silence can be explained. *Slattery v. People*, 76 Ill. 217; *Broyles v. State*, 47 Ind. 251. Nor where the charges are made against him in a judicial proceeding. *Johnson v. Holliday*, 79 Ind. 151; *People v. Willett*, 92 N. Y. 29; a. c. 27 Hun, (N.Y.) 469. But see *Blanchard v. Hodgkins*, 62 Me. 119. But it is otherwise where he is at full liberty to speak. *Puett v. Beard*, 86 Ind. 104; *Kendrick v. State*, 55 Miss. 436; *Kelly v. People*, 55 N. Y. 565; *State v. Bowman*, 80 N. C. 432; *Ettinger v. Common-*

Confessions taken down in writing. If the confession is taken down in writing and signed by the prisoner, or its truth acknowledged by parol, or if it be written by him, then it is put in as an ordinary document and read by the officer of the court. *R. v. Swatkins*, 4 C. & P. 550, 19 E. C. L. But if it be taken down by a person who is present when the confession is made, and is not signed or acknowledged by the prisoner, the document is not itself evidence, but may be used by the person who made it to refresh his memory. 4 C. & P. 550, note *b*, 19 E. C. L. According to general principles, if the confession were contained in a document, which was in existence and admissible in evidence, parol evidence could not be given of it. See *R. v. Gay*, 7 C. & P. 230, *supra*, p. 38, 32 E. C. L.¹

The mode of introducing confessions. For the purpose of introducing a confession, it is unnecessary in general, to negative any promise or inducement, unless there is good reason to suspect that something of the kind has taken place. In a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in *57] *prison, to a coroner for whom the prisoner had sent. It, however, appeared that previous to this time, Mr. Clifton, a magistrate, had had an interview with the prisoner, and it was suggested on behalf of the prisoner, that he might have told the prisoner that it would be better to confess, and that therefore the counsel for the prosecution were bound to call him. *Littledale, J.*, "As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses." *R. v. Clewes*, 4 C. & P. 221, 19 E. C. L. So where a prisoner being in the custody of two constables on a charge of arson, one B. went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to

wealth, 98 Pa. St. 338. But see *Campbell v. State*, 55 Ala. 80. It is error to admit an accusation of prisoner by deceased after his arrest and the prisoner's silence. *State v. Diskin*, 34 La. An. 919. The conduct of the prisoner after the indictment has been found is irrelevant. *Morgan v. Commonwealth*, 14 Bush, (Ky.) 106. But inculpatory statements made by defendant's brother and not denied by him should go to the jury. *Moyer v. State*, 66 Ga. 740. On refusal of arrested person to place his foot in certain tracks at request of officer arresting him, see *State v. Graham*, 74 N. C. 646.] The possession by a prisoner of an unanswered letter will not authorize it to be given in evidence against him. *People v. Green*, 1 Park. C. R. 11; see *State v. Arthur*, 2 Dev. 217. The declarations of a third person in the presence of the party but in a judicial proceeding are not admissible against him. *Brainerd v. Buck*, 25 Vt. 573; *Curr v. Hilton*, 1 Curt. C. C. 390. The record of an admission of a fact made for the purpose of a trial on an indictment by the prisoner's counsel in open court in his presence may be read in evidence. *People v. Garcia*, 25 Cal. 531. In criminal cases a plea drawn by the defendant's attorneys and signed by them on his behalf, if rejected by the court, is not to be regarded as a confession or admission which can be read against him. *Commonwealth v. Lannan*, 13 Allen, 563. S.

¹ If the examination of the prisoner was not reduced to writing before the committing magistrate, parol evidence may be given of it. *State v. Parish*, Bush. 239. Parol proof of the confession of a prisoner is admissible unless the defendant can prove the existence of a confession reduced to writing and signed by the prisoner. *State v. Johnson*, 5 Harring. 507. S.

him, and they went into another room, when the prisoner made a statement; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess, and *R. v. Swatkins, infra*, was relied upon. Taunton, J., "A confession is presumed to be voluntary, unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed." Having consulted Littledale, J., his lordship added, "We do not think, according to the usual practice, that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement, otherwise he must in all cases call the magistrates and constables before whom or in whose custody the prisoner has been." *R. v. Williams*, Glouc. Spr. Ass. 1832, 3 Russ. on Crimes, 497, 5th ed.

But if there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed in the first instance by the prosecutor calling such officer. Upon an indictment for arson, it appeared that a constable, who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room the prisoner said he wished to speak to him, and motioned the other constable to leave the room, which he did, and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered the room. It was contended that the other constable must be called to show that he had used no inducement to make the prisoner confess. Patteson, J., "I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables." *R. v. Swatkins*, 4 C. & P. 548, 19 E. C. L. In order to induce the court to call another officer into whose custody the prisoner has been, it must appear either that some inducement has been used by, or some express reference made to, such officer. A prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession which he had previously made to Williams, a constable. It was submitted that Williams ought to be called to prove that he had not used any *inducement. Littledale, J., "Al- though I do not think it necessary that a constable in whose [*58 custody a prisoner has been, should be called in every case, yet, as in this case there is a reference to the constable, I think he ought to be called." Williams was then called, and proved he did not use any undue means to obtain a confession; but he had received the prisoner from Marsh, another constable, and the prisoner had made some statement to Marsh. It was then urged that Marsh should be called.

Littledale, J., "I do not think it is necessary that a constable should be called, unless it appear that some promise was given or some express reference was made to the constable. There was a distinct reference made to Williams, and, therefore, I thought he must be called, but there is no reference to Marsh. It does not appear either that any confession was made to Marsh. It only appears that a statement was made that might either be a confession, a denial, or an exculpation." *R. v. Warner*, Glouc. Spr. Ass. 1832, 3 Russ. on Crimes, 498, 5th ed.¹

If evidence of a confession be received, and it afterwards appear from other evidence that an inducement was held out, which, had it been known at the time, would have rendered the evidence inadmissible, the proper course for the judge to take is to strike the evidence of confession out of his notes, and to tell the jury to pay no attention to it. *R. v. Garner*, 1 Den. C. C. 329; 2 C. & K. 920, 61 E. C. L.

¹ If a confession is offered in evidence, the defendant is entitled before it is received to prove that it was not made voluntarily. *People v. Soto*, 49 Cal. 69. Where a witness has testified that a confession was not induced by promises or threats, the defendant is entitled to offer rebutting proof, and the refusal of such offer is error. *State v. Platte*, 34 La. An. 1061. The burden of showing this rests upon the defendant. *Rufer v. State*, 25 O. St. 464. *Contra*, before a confession can be received, affirmative proof must be made that it was voluntary. *State v. Garvey*, 28 La. An. 925; *Metzger v. State*, 18 Fla. 481; *Barnes v. State*, 36 Tex. 356; *Nicholson v. State*, 38 Md. 140; *State v. Johnson*, 30 La. An., Part II, 881. The prosecution may produce evidence that it was voluntary to rebut proof that it was induced by threats or promises. *Commonwealth v. Ackert*, 133 Mass. 402. Where a confession has been admitted without objection on behalf of defendant, the court will not afterwards exclude it, on the ground that there was no preliminary proof that it was voluntary, unless it shows on its face that it was obtained by means of promises or threats. *State v. Davis*, 34 La. An. 351. Whether a confession is voluntary is a question for the court, and its ruling is not ground for reversal, unless arbitrarily abused. *Runnels v. State*, 28 Ark. 121; *Wallace v. State*, 28 Ark. 531. The jury cannot consider its competency, but only its weight and credibility. *Washington v. State*, 53 Ala. 29. But though the question of inducement is primarily for the court, where there is conflict of testimony they should submit it to the jury. *People v. Kurtz*, 42 Hun, (N. Y.) 335.

*EXAMINATION OF THE PRISONER.

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Statute 11 & 12 Vict. c. 42. The foregoing pages relate only to the confessions and admissions made by persons charged with offences to third persons, and not to those made to magistrates during the examinations directed to be taken by statute.¹ Those examinations formerly taken under the 1 & 2 P. & M. c. 13, 2 & 3 P. & M. c. 10, and 7 Geo. 4, c. 64, are now governed by the 11 & 12 Vict. c. 42.

That statute, after pointing out the mode in which the depositions are to be taken, enacts by s. 18, "That after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices, by or before whom such examination shall have been so completed, as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read, to the accused the depositions taken against him, and shall say to him these words or words to the like effect, 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favor and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that *whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; pro-

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¹ As to examinations under the statute see *People v. Restall*, 3 Hill, 289. S.

vided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person."

Mode of taking examinations—the caution. The 28th section of the above statute declares that the forms given in the schedule are to be deemed good, valid, and sufficient in law; and the form in the schedule does not contain the second caution mentioned in s. 18. It has, therefore, been held that, if the first caution has been given, the statement of the prisoner is admissible without any further question. *R. v. Bond*, 1 Den. C. C. 517; 19 L. J., M. C. 138; *R. v. Sansome*, 1 Den. C. C. 145; 25 L. J., M. C. 143. It has been suggested that the second caution was intended to be used where there has been a previous promise or threat made to the prisoner. *Per Alderson, B.*, in *R. v. Bond*, *ubi supra*; and *Erle, J.*, in *R. v. Sansome*, intimated that it would be prudent in justices always to give the prisoner the second caution, as being the only course which would preclude all possibility of question as to the admissibility of his statement; for as it was not yet decided whether that caution was absolutely requisite when a previous inducement or threat had been held out, and the justice could never be certain whether such previous threat or inducement had or had not been held out, a perplexing question might arise as to the sufficiency of the first caution to remove the effect on the prisoner's mind of such threat or inducement, should it afterwards appear in fact that either had been held out.¹

Mode of taking examinations—must not be upon oath. The examination of a prisoner must not be taken upon oath: if it be so, it will not be receivable in evidence. This was frequently so held before the 11 & 12 Vict. c. 42, was passed; *R. v. Smith*, 1 Stark. N. P. 242, 2 E. C. L.; *R. v. Rivers*, 7 C. & P. 177, 32 E. C. L.; *R. v. Pikesley*, 9 C. & P. 124, 38 E. C. L.² This of course does not apply to a confession made on oath by the prisoner when giving testimony upon another inquiry. And the deposition of a witness taken before magistrates was allowed by Cockburn, C. J., to be read at the trial as evidence against him, although after his evidence was taken the magistrates committed him for trial, his evidence criminating himself. *R. v. Chidley*, 8 Cox, C. C. 365.

The prisoner's deposition on oath, in reference to such inquiries, is

¹ *People v. Smith*, 1 Wheeler's C. C. 54. The prisoner is not bound to answer, but if he submits to answer, and answers falsely, the prosecutor may disprove it, and it will be taken strongly against the prisoner. *Case of Goldsby et al.*, 1 Rogers' Rec. 81. 8.

² Nor is the examination of any person under arrest admissible if conducted in violation of any statute. *People v. Mondon*, 4 N. Y. Crim. Rep. 552. *G. Hendrickson v. People*, 10 N. Y. 13; *People v. McMahon*, 15 N. Y. 384; *Teachout v. People*, 41 N. Y. 9; *People v. McGloin*, 1 N. Y. Crim. Rep. 105; *People v. McCallam*, 3 Id. 189; *People v. Kelly*, Id. 414; *People v. Jaehne*, 4 Id. 478.

clearly admissible. 3 Russ. Cri. 482, 5th ed. Thus, where the prisoner was tried for arson, and there had been a previous inquiry, legally held, as to the origin of the fire, at which the prisoner had been examined on oath as a witness, and had not been improperly compelled to answer questions tending to criminate him, his depositions thus taken were admitted as evidence against him. *R. v. Coote*, L. R. 4 Pr. C. 599; 42 L. J. Pr. C. 45, *post*, Privilege of Witnesses. It was, however, formerly doubted whether, if a person who had given evidence upon oath before a coroner were afterwards made the subject of a criminal charge arising out of the same facts, his deposition could be given in evidence against him. *R. v. Wheeley*, 8 C. & P. 250, 34 E. C. L.; but in several **later cases* they have been admitted. *R. v. Owen*, [9 C. & P. 83, 38 E. C. L.; *R. v. Colmar*, 9 Cox, C. C. 506; *R. v. Bateman*, 4 F. & F. 1068; *R. v. Wiggins*, 10 Cox, C. C. 562. In *R. v. Biggadike*, Lincoln Winter Assizes, 1868, Byles, J., admitted in evidence a statement upon oath made by the prisoner voluntarily, and before she was in custody, not signed by her, but taken down in writing by the coroner at the time. The coroner was called. His lordship said the authorities were in favor of the admissibility of the evidence, and he himself had no doubt on the subject. The prisoner, who was charged with wilful murder by poisoning, was sentenced to death and hanged. In the case of William York, a boy ten years old, who was charged before the coroner's jury with murder, which he at first denied, but on being closely interrogated, confessed, such confession, together with others subsequently made to the magistrates and other persons, were admitted as evidence against him, *Fost. C. C. 70*. It does not appear whether the boy's confession before the coroner was upon oath or not. 1 Russ. Cri. 110, 5th ed.¹ Certain instances where the prisoner may, if he thinks fit, be examined on oath, will be found set out, *post*, under the head of Incompetency of Witnesses.

Statements made by the prisoner not returned under the statute. There is considerable confusion as to the admissibility of statements made by the prisoner before the examining magistrate, which are either not returned at all in the depositions, or which, being returned, are found to want one or more of the formalities required to make them available under the statutes from time to time in force on this subject. It seems, however, clear, that if no examination was taken in writing, then the evidence was always considered admissible. But this must be distinctly shown. Thus where the witness stated that no examination was taken down in writing, Parke, J., said, "As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was

¹ *People v. Martinez*, 66 Cal. 278; *Newton v. State*, 21 Fla. 53; *People v. Mondon*, 4 N. Y. Crim. R. 112. Such evidence is admissible even when obtained improperly. *Greenleaf's Evid.* 13th edition, § 254 a.; *State v. Garrett*, 71 N. C. 85. *Contra*, *Farkas v. State*, 60 Miss. 847; *People v. Mondon*, 4 N. Y. Crim. Rep. 552. It has been held admissible to contradict the defendant's testimony on his own behalf on the trial. *Woods v. State*, 63 Ind. 353.

taken in writing; and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence." *R. v. Packer*, Glouc. Spr. Ass. 1829, 3 Russ. Cr. 505 (n), 5th ed.; *R. v. Phillips*, Worc. Sum. Ass. 1831. Where the only evidence against the prisoner was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *vidæ voce* testimony of two witnesses who were present, all the judges (except Gould, J.) were of opinion that this evidence was well received. *R. v. Huet*, 2 Leach, 821.¹

So it has been held that remarks or statements made by a prisoner after the commencement of the investigation before the magistrate, and whilst the witnesses are giving their testimony, are receivable in evidence although the prisoner's examination is afterwards taken in writing. Thus where one of two prisoners was committed before the other was apprehended, and the depositions against that prisoner were read over before the magistrate to the other prisoner, and after they were read the prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoner before himself, and that the statement to the witness was not contained in it; Parke, J., held that what the prisoner had said to the witness might be given in *62] evidence. *R. v. Johnson*, Glouc. Spr. Ass. 1829, 3 Russ. on Crimes, 509, 5th ed. So where a man and woman were brought before the magistrate on a charge of burglary, and, in the course of the examination of a witness, a glove was produced, which had been found on the man with part of the stolen property in it; on which the man said, "She gave me the glove, but she knew nothing of the robbery;" the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statements, in the depositions or the examination of the prisoner, Erskine, J., held that what the man said might be proved by parol evidence, *R. v. Hooper*, Glouc. Sum. Ass. 1842, Id. And it was said by Best, C. J., that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. *Rowland v. Ashby*, Ry. & Moo. 232, 21 E. C. L. So it has been ruled by Parke, J., that an *incidental observation* made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry, so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against the prisoner. *R. v. Moore*, Matthew's Dig. Cr. Law, 157; *R. v. Spilsbury*, 7 C. & P. 187, 32 E. C. L., *per* Coleridge, J. But where it ought to have been taken down in writing, and it was not, Littledale, J., ruled that it was inadmissible. *R. v. Maloney*, Matthew's Dig. Cr. Law, 157. However, where on the examination of a prisoner, on a charge of stealing sheep, what was said as to the stealing of certain sheep, the property of

¹ *McKenno's Case*, 5 Rogers' Rec. 4; *Collin's Case*, 4 Rogers' Rec. 139. S.

one person, was taken down in writing by the magistrate, but not what was said as to other sheep, the property of another person : on a question reserved for the opinion of the judges, whether any confession, as to the latter offence, could be supplied by parol evidence ; and whether, as the magistrate had taken down in writing everything he heard, and intended to take down all that was said to him, and believed he did so, parol evidence could be given of anything else that had been addressed to him ; the judges present were all of opinion that the evidence was admissible. *R. v. Harris*, 1 Moody, C. C. 343. Mr. Phillippo's remarks on this case, that it is not an authority for the position that parol evidence is admissible of a statement made by a prisoner, which has not been taken down in his examination, on the ground that the parol testimony there received related to another offence distinct from that mentioned in the examination. 2 Phill. on Ev. 119, 10th ed. See, however, Mr. Greaves' observations, *contra*, 3 Russ. on Crimes, 4th ed. 451. In *R. v. Lewis*, 6 C. & P. 162, 25 E. C. L., where *R. v. Harris* was cited, Gurney, B., said it was very dangerous to admit such evidence, and thought it ought not to be done in the case before him. So where the magistrate's clerk, in taking down the examinations of three prisoners, had left a blank whenever any one had mentioned the name of either of the other prisoners, Patteson, J., refused to allow the blanks to be supplied by the parol evidence of the clerk, observing that the rule ought not to be extended. *R. v. Morse*, 8 C. & P. 605, 34 E. C. L. In *R. v. Weller*, 2 C. & K. 223, 61 E. C. L., Platt, B., refused to receive evidence of something that was said by the prisoner before the magistrate, in the course of the examination of the witnesses, but which did not appear in the depositions. In *R. v. Watson*, 3 C. & K. 111, on the other hand, where the prisoner made a statement under similar circumstances which was written down in the depositions, but not signed by *the prisoner, Patteson, J., held that it was not evidence *per se*, [*63 but that any one who heard the prisoner make it might give evidence of it. In *R. v. Stripp*, 25 L. J., M. C. 109, the prisoner was brought before a magistrate on a charge of stealing a cash-box ; no evidence was given, the policeman asking for a remand, but the prisoner made a statement. This statement was repeated by the policeman at the second examination, and was embodied in his deposition. Evidence of this statement was also given by the policeman at the trial, and the question was reserved, whether or no it was properly received, the prisoner not having been previously cautioned. The judges held that it was ; Jervis, C. J., saying, "It is scarcely necessary to observe that the caution and warning prescribed by the statute is intended to apply to the final proceeding only, when, after all the witnesses have been examined, the prisoner is asked whether he has anything to say in answer to the charge. This provision of the statute, however, does not exclude any declaration or voluntary statement made by the party accused before, during, or after the inquiry."

Upon the whole, it seems perfectly clear that what is said by a prisoner at any time during the preliminary inquiry before a magistrate

taken in writing; and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence." *R. v. Packer*, Glouc. Spr. Ass. 1829, 3 Russ. Cr. 505 (n), 5th ed.; *R. v. Phillips*, Worc. Sum. Ass. 1831. Where the only evidence against the prisoner was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *vidæ voce* testimony of two witnesses who were present, all the judges (except Gould, J.) were of opinion that this evidence was well received. *R. v. Huet*, 2 Leach, 821.¹

So it has been held that remarks or statements made by a prisoner after the commencement of the investigation before the magistrate, and whilst the witnesses are giving their testimony, are receivable in evidence although the prisoner's examination is afterwards taken in writing. Thus where one of two prisoners was committed before the other was apprehended, and the depositions against that prisoner were read over before the magistrate to the other prisoner, and after they were read the prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoner before himself, and that the statement to the witness was not contained in it; Parke, J., held that what the prisoner had said to the witness might be given in *evidence. *R. v. Johnson*, Glouc. Spr. Ass. 1829, 3 Russ. on *62] Crimes, 509, 5th ed. So where a man and woman were brought before the magistrate on a charge of burglary, and, in the course of the examination of a witness, a glove was produced, which had been found on the man with part of the stolen property in it; on which the man said, "She gave me the glove, but she knew nothing of the robbery;" the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statements, in the depositions or the examination of the prisoner, Erskine, J., held that what the man said might be proved by parol evidence, *R. v. Hooper*, Glouc. Sum. Ass. 1842, Id. And it was said by Best, C. J., that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. *Rowland v. Ashby*, Ry. & Moo. 232, 21 E. C. L. So it has been ruled by Parke, J., that an *incidental observation* made by a prisoner *in the course of his examination* before a magistrate, but which does not form a part of the judicial inquiry, so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against the prisoner. *R. v. Moore*, Matthew's Dig. Cr. Law, 157; *R. v. Spilsbury*, 7 C. & P. 187, 32 E. C. L., *per* Coleridge, J. But where it ought to have been taken down in writing, and it was not, Littledale, J., ruled that it was inadmissible. *R. v. Maloney*, Matthew's Dig. Cr. Law, 157. However, where on the examination of a prisoner, on a charge of stealing sheep, what was said as to the stealing of certain sheep, the property of

¹ McKenno's Case, 5 Rogers' Rec. 4; Collin's Case, 4 Rogers' Rec. 139. S.

reconcilable on this principle. See *R. v. Lambe*, 2 Leach, 552; *R. v. Thomas*, 2 Leach, 637; *R. v. Bennet*, 2 Leach, 553 (*n*); *R. v. Telicote*, 2 Stark, N. P. 483, 3 E. C. L.; and see *R. v. Jones*, 2 Russ. 658; *R. v. Sykes*, Shrewsbury Spr. Ass. 1830, 3 Russ. on Cr., by Greaves, 456, 4th ed.; *R. v. Wilson*, Shrewsbury Spr. Ass. 1830, Id. Where, therefore, before the 11 & 12 Vict. c. 42, the prisoner refused to sign the memorandum of his statement, or to acknowledge its truth, it was necessary to prove the statement by a witness who heard it. See 2 Phill. Ev. 116, 10th ed.

Examinations informal—used to refresh the memory of witness. It has already appeared that if the examination of a prisoner has been taken down in writing, but not in such a manner as that the writing itself is admissible under the statute, parol evidence of what the prisoner said is admissible; and in such case the writing may be referred to by the witness who took down the examination, in order to refresh his memory. Where a person had been examined before the lords of the council, and a witness took minutes of his examination, which were neither read over to him after they were taken, nor signed by him, it was held that although they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and having looked at them, to state what he believed was the substance of what the prisoner confessed in the course of his examination. *R. v. Laver*, 16 How. St. Tr. 215. So where an examination taken at several times, was reduced into writing by the magistrate, and on its being completed, was read over to the prisoner, but he declined to sign it, acknowledging at the same time that it contained what he had stated, although he afterwards said that there were many inaccuracies in it, it was held that this might be used as a memorandum to refresh the memory of the magistrate, who gave parol evidence of the prisoner's statement. *R. v. Jones*, 2 Russ. 658 (*n*). So, in *R. v. Telicote*, *supra*, supposing the written document was inadmissible, yet the clerk of the magistrate, who was called as a witness, might have proved what he heard the prisoner say on his examination, and have refreshed his memory by means of the examination which he had written down at the time. 2 Russ. 658; see 4 C. & P. 550 (*n*), 19 E. C. L. And see *R. v. Watson*, 3 C. & K. 111. So where, on a charge of felony, the examination of the prisoner was reduced into writing by the magistrates' clerk, but nothing appeared on the face of the paper to show that it was an examination taken on a charge of any felony, or that the magistrates who signed it were then acting as magistrates; Patteson, J., permitted the clerk to the magistrates to be called, and to refresh his memory from this paper. *R. v. Tarrant*, 6 C. & P. 182, 25 E. C. L.; *and see *R. v. Pressley*, Id. 183, 25 E. C. L.; *R. v. Bell*, 5 C. & P. 162, 24 E. C. L.; and *R. v. Watson*, 3 C. & K. 111. [*65

Mode of proof. If the examination has been taken in conformity with the provision of the statute, it proves itself. But should there

be alterations or erasures, the clerk to the magistrates, or some person who was present at the time, should be called to explain them. Where, upon an indictment for murder, it was proposed to prove the prisoner's examination before the coroner by evidence of the handwriting of the latter, and by calling a person who was present at the examination, it appearing that there were certain interlineations in the examination, Lord Lyndhurst said, that he thought the clerk who had taken down the examination ought to be called, and the evidence was withdrawn. *R. v. Brogan*, Lanc. Sum. Ass. 1834, MS.

Evidence against the prisoner only. In *R. v. Haines*, 1 F. & F. 86, Crowder, J., refused to allow the prisoner's statement which had not been put in evidence by the counsel for the prosecution to be put in on behalf of the prisoner. And it is evidence only against the prisoner who makes it. If two prisoners be taken before the magistrate on a charge, a statement made by the first prisoner cannot be given in evidence against a second prisoner, because when before the magistrate the second prisoner is only called upon to answer, if he pleases, the depositions which have been given on oath against him, and not what the other prisoner may have said on his examination. *R. v. Swinnerton*, C. & M. 593, 41 E. C. L., *per* Patteson, J. As to the examination being put in by the direction of the court, see *post*, tit. Practice.

*DEPOSITIONS.

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Depositions—when admissible. The question of the admissibility of evidence in criminal cases of what are usually called *depositions* is one by no means free from difficulty. It is not within the scope of this work to enter at length into the discussion of this question, but it is necessary to point out the rules which have been generally acknowledged, the difficulties which have arisen, and the opinions which have been expressed in reference to this subject.¹

It is a well-known rule of evidence, and one which is treated as generally applicable both to civil and criminal cases, that what a witness has once stated on oath in a judicial proceeding may, if that witness cannot possibly be produced again, be given in evidence, provided the inquiry be substantially the same on both occasions, and between the same parties. This applies not only to evidence taken at different stages of the same inquiry, but to successive inquiries into the same matter; as, for instance, to a new trial granted in a case of misdemeanor.

It is also a well-known rule of evidence that upon any point material to the issue, a witness may be contradicted or discredited by showing that he has on a previous occasion made statements at variance with that made by him at the trial. This includes all previous statements of the witness, whether on oath or not, and whether in a judicial proceeding or not. And as to this rule, see now 28 & 29 Vict. c. 18, ss. 4, 5, *post*, Examination of Witnesses.

Now it is obvious that a totally different class of considerations will apply to the proof of the previous statements according as they are used as evidence in chief, or to discredit the witness only. It is

¹ There is no authority at common law for taking depositions in criminal cases out of court without the consent of the defendant. *People v. Restell*, 3 Hill, 289. Depositions in perpetual remembrance, taken before an indictment is found, are not admissible on the trial of the indictment. *Commonwealth v. Ricketson*, 5 Metc. 412. See *Johnson v. State*, 27 Tex. 758; *Richardson v. People*, 31 Ill. 170. S.

*67] *absolutely necessary, therefore, in considering how such previous statements are to be proved, never to lose sight of the purpose for which they are being used ; and it is from not doing so that much of the confusion on this point of the law of evidence has arisen.

In criminal cases it is generally with respect to the preliminary inquiry before magistrates on charges of felony and misdemeanor that this question assumes its greatest importance ; when, therefore, in what follows, we speak of *depositions*, it will be understood that *depositions* so taken are alone referred to.

Depositions when used to contradict a witness—how proved. The following rules relating to this question were laid down by the judges after the passing of the Prisoner's Counsel Act, 6 & 7 Will. 4, c. 114 (see 7 C. & P. 676, 32 E. C. L.).

1. That where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not in his deposition make such or such statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein, and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. That after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition ; after which the counsel for the prosecution may re-examine, and after the prisoner's counsel has addressed the jury, will be entitled to reply. And in case the counsel for the prisoner comments upon any supposed variances or contradiction without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. That the witness cannot in cross-examination be compelled to answer whether he did or did not make such and such a statement before the magistrate until after his deposition has been read, and it appears that it contains no mention of such a statement. In that case the counsel for the prisoner may proceed with his cross-examination ; and if the witness admits such statements to have been made, he may comment upon such admission or upon the effect of it upon the other part of his testimony ; or, if the witness denies that he made such a statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

The effect of these rules is that the depositions returned by the magistrates before whom the preliminary inquiry took place must, if anything said upon that inquiry is to be used for the purpose of discrediting a witness, be first put in evidence ; but these rules expressly recognize that what appears upon the depositions is not in any way conclusive as to what passed on that occasion, which, after the deposi-

tions have been once read, may be proved by the witness's admission, or, if it be material to the issue, by other witnesses who were present. This appears to be the view taken by Erle, J., in *R. v. Curtis*, 2 C. & K. 763, 61 E. C. L. These rules must now be read in connection with 28 & 29 Vict. c. 18, ss. 4, 5, and it seems to *be doubtful whether they are any longer in force. See *Tayl. on Ev.*, p. [*68 1255, 6th ed. See *post*, Examination of Witnesses.

It has been suggested that there is a difference between *adding to* and *varying* depositions; *per* Alderson, B., in *R. v. Coveney*, 7 C. & P. 667, 32 E. C. L.; and there can be no doubt that, as a general principle, you may add to but not vary written evidence. See *infra*. The question is whether that principle is applicable to the case now under consideration. At common law the return of the magistrate would not be even *admissible* to contradict a witness, any more than a judge's notes in a civil case; but ever since the statute of the 1 & 2 P. & M. c. 13, this return has been considered as *admissible*; but on the general principles of evidence, this would not exclude additions which were not variations.

Depositions when used as substantive evidence—how proved. When depositions taken before the magistrate are used to supply the testimony of an absent witness, there is then considerable authority for saying that the return of the magistrate is the best and only evidence as to what was said before him. That it is the best evidence has always been acknowledged, and was laid down by Lord Mansfield in *R. v. Fearshire*, 1 Lea. 202; and that it is the only evidence has also generally been acknowledged, and was so said by Mr. Justice Holroyd in *R. v. Thornton*, 2 Ph. & Arn. Ev. 104, 10th ed. (n).¹

As already pointed out, there is a difference between adding to and varying written evidence, and it has been sometimes urged that even where a deposition is used as substantive evidence, it might be added to though not varied. But it must be recollected that, under the statute 11 & 12 Vict. c. 42, s. 17, *infra*, if the magistrates do their duty, the return of the depositions will be both *exclusive* and *inclusive*; and though it cannot be denied that, on general principles of law, a deposition may be added to, there are very sound reasons why an exception should be made in this particular case; for there might be very great danger in trusting to the oral repetition of testimony, which, under all circumstances, must be less satisfactory than that ordinarily given.

These considerations do not apply with equal force to depositions produced for the purpose of contradicting or lessening the credit of a witness. For, in the first place, many matters which do not appear material to the charge at the preliminary inquiry, and which, therefore, would not be returned, may become exceedingly important for the purpose of testing the truth of the testimony of a witness; and, moreover, the witness being himself then and there present, his own memory and conscience can be searched as to what was really said before the magistrate.

¹ *Wright v. State*, 50 Miss. 332; *Cicero v. State*, 54 Ga. 156.

The result suggested is, that to discredit a witness the depositions may be added to but not varied, but, when they are used as substantive evidence, the return of the justices is final and conclusive. There is still one difficult question which is not unlikely to arise, and which has not yet been discussed; i. e., whether, if no deposition be returned by the magistrate, or one which from some informality cannot be used, whether in any case other evidence ought to be received of what was said by the witness. It will scarcely be denied that, on general principles, all the usual evidence would be let in in such a case, but it is unnecessary to repeat the arguments which go to show that, as substantive evidence, nothing should be received, *69] *which is not returnable by the magistrate. See also the remarks, *ante*, pp. 61, 62, 63.

Depositions when admissible as substantive evidence. Depositions are admissible as substantive evidence at common law, should the witness be either dead,¹ Hale, P. C. 305; *R. v. Westbeer*, Lea. C. C.

¹ So the evidence given by a witness, since dead, on a former trial, is competent. *Wilbur v. Selden*, 6 Cow. 162; *Johnston v. State*, 2 Yerg. 58; *Watson v. Lisbon Bridge*, 14 Me. 201; *State v. De Witt*, 2 Hill. S. C. 282; *Keecher v. Hamilton*, 3 Dana, 38; *Kelley's Exr. v. Connell's Adm.*, 3 Dana, 533; *Robson v. Doe*, 2 Blackf. 308. [*Owens v. State*, 63 Miss. 450; *Strickland v. Hudson*, 55 Miss. 235; *Summons v. State*, 5 O. St. 325; *Barnett v. State*, 54 Ill. 325; *Commonwealth v. Richards*, 18 Pick. (Mass.) 434; *Broyles v. State*, 47 Ind. 251; *Brown v. Commonwealth*, 73 Pa. St. 321. Even though in the previous trial the jury was empaneled under an unconstitutional statute. *State v. Johnson*, 12 Nev. 121.] In Virginia it has been held inadmissible in criminal cases. *Finn v. Commonwealth*, 4 Rand. 501. [Under the Texan code such evidence may be introduced both by the State and by the accused. *Johnson v. State*, 1 Tex. App. 333; *Black v. State*, Id. 308.] In a criminal case the public prosecutor will not be allowed to use the testimony given by a witness at a former trial of the same indictment, though he be absent from the State. *People v. Newman*, 5 Hill, 295. So the evidence is admissible where the witness has become unable to speak from paralysis. *Rogers v. Raborg*, 2 G. & J. 54. [But not where he is unable to attend the trial from sickness merely. *McClain v. Commonwealth*, 99 Pa. St. 86.] It is not enough that he has forgotten. *Drayton v. Well*, 1 N. & McC. 409. Nor that he has become interested. *Chess v. Chess*, 17 S. & R. 409; *Irwin v. Reed et al.*, 4 Y. 512. Nor that he has been convicted of an infamous crime. *Le Baron v. Crombie*, 14 Mass. 234. Nor it seems that he is not to be found. *Wilbur v. Selden*, 6 Cow. 162; *Arderry v. Commonwealth*, 3 J. J. Marsh. 185. *Contra*, *Magill v. Cauffman*, 4 S. & R. 319; *Rogers v. Raborg*, 3 G. & J. 54; *Pettibone v. Derringer*, 4 Wash. C. C. 215; *Reed v. Bertrand*, Id. 538. [The testimony of a witness for the defence, when reduced to writing at the preliminary examination, is admissible at the trial, when the witness cannot be produced. *State v. Stewart*, 34 La. Ann. 1037. By California statute a deposition of an absent witness taken before a magistrate may be read at the trial. *People v. Oiler*, 66 Cal. 101.] The very words of the witness must be sworn to. *United States v. Wood*, 3 Wash. C. C. 440; *Wilbur v. Selden*, 6 Cow. 162; *Ballenger v. Barnes*, 3 Dev. 460; *Bowie v. O'Neill et al.*, 5 H. & J. 266. But *contra*, *Caton et al. v. Lennox et al.*, 5 Rand. 31; *Cornell v. Green*, 10 S. & R. 14. The whole examination must be given. *Wolf v. Wyeth*, 11 S. & R. 149. See the following cases as to notes of counsel. *Lightner v. Willie*, 4 S. & R. 203; *Watson v. Gilday*, 11 Id. 337; *Chess v. Chess*, 17 Id. 409; *Miles v. O'Harra*, 4 Binn. 110; *Foster v. Shaw*, 7 S. & R. 156. [On stenographers' notes. *People v. Sligh*, 48 Mich. 54; *People v. Qurise*, 59 Cal. 343; *People v. Chung Ah Chue*, 57 Cal. 567.] The *postea* of the former trial must be produced. *Beales v. Guernsey*, 8 Johns. 446. It is error to prove what a deceased witness testified to upon a former trial between the same parties, without proving the fact of such trial by the record; but the error is cured if such record proof be produced before the close of the evidence. *Weart v. Hoagland, Adm.*, 2 Zab. 517. When a witness, who has once testified upon the trial of a case, has deceased, his tes-

12; *R. v. Bromwich*, 1 Lev. 180; *Salk*, 281; *B. N. P.* 242; or be in such a state as never to be likely to be able to attend the assizes; *R. v.*

timony may be used upon a subsequent trial of the same case, provided the substance of what is testified, both in chief and on cross-examination, can be proved in the very words used by him. *Marsh v. Jones*, 21 Vt. 378. It is not enough that the former trial was upon the same general subject; the point in issue must be the same. *Melvin v. Whiting*, 7 Pick. 79. [See *State v. McNeill*, 33 La. Ann. 1332; *contra*, *McClain v. Commonwealth*, 99 Pa. St. 86.] So evidence of what a deceased witness swore on a question of bail, is inadmissible on the trial of the cause. *Jackson et al. v. Winchester*, 4 Dall. 206. See *Jessup v. Cook*, 1 Halst. 434. Where a person is offered as a witness to prove the testimony of a deceased witness on a former trial of the same cause, he cannot be permitted to testify, if he states that he can give only the substance of such testimony, but not the language of the witness. *Warren v. Nicholls*, 6 Metc. 261. Where, in the trial of a cause, it is necessary and proper to prove what a deceased witness swore on a former trial between the same parties, where the issue and matter in controversy is the same, it is sufficient for a living witness, who is called to testify, to prove that the deceased witness swore to certain facts, and he need not prove the precise words employed by such deceased witness. *Garratt v. Johnson*, 11 G. & J. 173. [A statement thereof in a bill of exceptions would be inadmissible as contravening the constitutional right of the accused to meet the witness face to face. *Kean v. Commonwealth*, 10 Bush (Ky.) 180. But the witness may use the bill of exceptions to refresh his memory. *State v. Able*, 65 Mo. 357.] Where the merits were tried on a former suit, but the verdict was against the plaintiff, solely on the ground of his incapacity to recover for want of interest in the note sued upon, the evidence given by witnesses then examined is admissible, if they are out of the State. *Hacker v. Jamison*, 2 W. & S. 438. The absence of a witness from the State, so far as it affects the admissibility of secondary evidence, has the same effect as his death. [In civil issues.] *Alter v. Berghaus*, 8 W. 77. [Emig v. Diehl, 76 Pa. St. 359. But not in criminal trials.] *Sullivan v. State*, 6 Tex. App. 319; *Collins v. Commonwealth*, 12 Bush. (Ky.) 271.] If a witness be out of the State, notes of his testimony, proved to have been correctly taken upon a former trial of the cause, may be read in evidence. But if it appears that the witness absented himself from that trial before he was fully examined, his testimony given cannot be read in evidence. *Noble v. McClintock*, 6 W. & S. 58. A party is not entitled to the benefit of the testimony of a witness who dies after he has been examined and testified, and before the opposite party has had an opportunity to avail himself of a cross-examination. *Kissam v. Forrest*, 25 Wend. 651. [See *People v. Penhollow*, 42 Hun. (N. Y.) 103.] The testimony of a witness since deceased, on a former trial, taken down in writing and sworn to, though not from recollection, may be given in evidence. *Van Buren v. Cockburn*, 14 Barb. 118; *Riggins v. Brown*, 12 Ga. 271; *Walker v. Walker*, 14 Id. 242. In a criminal case the prosecutor will not be permitted to use the testimony given by a witness at a previous trial, although he be absent from the State. *People v. Newman*, 5 Hill. 295. The deposition of a witness taken before the examining court, cannot be used against a prisoner on trial for murder, it being proved that the witness is beyond the jurisdiction of the court, unless it is also proved that such absence was caused by the defendant. *State v. Houser*, 26 Mo. 431. [U. S. v. Reynolds, 1 Utah I. 319; *Owens v. State*, 63 Miss. 459; *Collins v. Commonwealth*, 12 Bush (Ky.) 271; *People v. Newman*, 5 Hill (N. Y.) 295; *Finn v. Commonwealth*, 5 Rand. (Va.) 701; *Brogy v. Commonwealth*, 10 Gratt. (Va.) 722; *Gerhauser v. N. B. Ins. Co.*, 7 Nev. 174; *State v. Houser*, 26 Mo. 431.] When a witness for the prisoner is absent from the State at the time of the second trial, it is not competent for the prisoner to show what the witness swore to at the first trial. *Brogy v. Commonwealth*, 10 Gratt. 722. The notes of counsel of a deceased witness on a former trial between the same parties, are evidence when proved to be correct in substance, although the counsel does not recollect the testimony independent of his notes. *Rhine v. Robinson*, 3 Cas. 30; *Jones v. Ward*, 3 Jones' Law, 24; *Ashe v. De Rosset*, 5 Id. 299; *Crawford v. Loper*, 25 Barb. 449; *Wright v. Stowe*, 4 Jones' Law, 516; *Summons v. State*, 5 O. St. 325. *Contra*, *Yancey v. Stone*, 9 Rich. Eq. 429. The exact words of a deceased witness need not be proved. It is sufficient if the substance of all he said on the examination and cross-examination in relation to the subject-matter in controversy be shown. *Kendrick v. State*, 10 Humph. 479; *Sharp v. State*, 15 Ala. 749; *Davis v. State*, 17 Id. 354; *State v. Hooker*, 17 Vt. 658. When the evidence of a deceased witness is offered, the substance of his whole testimony must be proved; if any parts of it are irrelevant the court may reject them.

Hogg, 6 C. & P. 176, 25 E. C. L.; *R. v. Wilshaw*, Carr. & M. 145, 41 E. C. L.; or if the witness be kept away by the practices of the prisoner; *R. v. Guttridge*, 9 C. & P. 471, 38 E. C. L. The admissibility of depositions is now governed by the 11 & 12 Vict. c. 42, s. 17, which provides that in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if, upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel; and if it also be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witnesses, then, if such deposition purport to

Mayer v. Doe, 32 Ala. 699; *Emery v. Fowler*, 33 Me. 326. [The witness may be asked in cross-examination to state the whole testimony; and the counsel need not state what he expects to prove by this question. *Harness v. State*, 57 Ind. 1.] It is sufficient if a witness can give the substance of the evidence of a deceased witness at a former trial, although not in the same words. *Rivereau v. St. Amet*, 3 Ia. 118. As to the deposition of deceased witnesses before the examining magistrate. *State v. Valentine*, 7 Ired. 225. Proof of what a deceased witness testified before the committing magistrate is admissible, though not reduced to writing. *State v. Hooker*, 17 Vt. 658; *Davis v. State*, 17 Ala. 354. [But not the affidavit of the relatrix instituting the prosecution. *Broyles v. State*, 64 Ind. 460. So also the testimony of a witness who has become insane is admissible. *Marler v. State*, 67 Ala. 55.] The deposition of a deceased witness is not admissible, unless the prisoner was present. *State v. Campbell*, 1 Rich. 124; *Collier v. State*, 8 Eng. 676. Depositions cannot be used in criminal trials. *Dorninger v. State*, 7 Smed. & M. 475. Evidence of the testimony of a deceased witness at a former trial of a criminal charge is admissible at a second trial for the same offence. *Pope v. State*, 22 Ark. 371; *State v. Staples*, 47 N. H. 113. [So also the cross-examination of a defendant obtained in one criminal prosecution is admissible as evidence against him in another criminal prosecution. *State v. Witham*, 72 Me. 531.] The circumstance that a witness has forgotten the facts to which he had formerly testified in the cause, does not render evidence of his former testimony competent. *Robinson v. Gilman*, 43 N. H. 295. S. Nor that witness did not respond to the summons. *State v. King*, 86 N. C. 603.

Where the terms on which the testimony taken at a preliminary examination is admitted on the trial, are prescribed by statute, those terms must be strictly complied with. *Pinkney v. State*, 12 Tex. App. 352; *Evans v. State*, Id. 370.

be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same. By the 30 & 31 Vict. c. 35, s. 3, provision is made for taking the depositions of witnesses for the defence, and by sect. 5 for the allowance of their expenses. By sects. 6 & 7 provision is made for taking the depositions of persons dangerously ill and not likely to recover, and for rendering such evidence admissible in the event of the death of such persons. See Appendix of Statutes.

None of the previous statutes (1 & 2 P. & M. c. 13; 2 & 3 P. & M. c. 10; 7 Geo. 4, c. 64) contained any directions as to *when* the depositions should be considered admissible. It will be observed that only two cases are mentioned in the above statute, "where the witness is dead, or so ill as not to be able to travel." It is not said in the statute that the deposition would be admissible if the witness were kept out of the way by the procurement of the prisoner, a case well *established at common law. See Tayl. on Ev., p. 465, 6th ed. [*70 However, in *R. v. Scaife*, 2 Den. C. C. 281; 17 Q. B. 208, where the prisoner was indicted together with Thomas Rooke and John Smith for larceny, evidence was given that by the procurement of Smith one of the witnesses for the prosecution had been kept out of the way, and her deposition was tendered; the evidence was admitted to be receivable as against Smith, but it was said that it was no evidence against Scaife and Rooke. The case came before the Court of Queen's Bench, and it was held that the learned judge ought to have told the jury that the evidence applied to the case of Smith only, and not to that of either of the other prisoners. Incidentally, therefore, the admissibility of the depositions as against a prisoner who has himself procured the absence of a witness, is recognized by this case.

There does not appear to be any criminal case in which the depositions have been admitted on the ground of the witness being insane either before or since the statute. In civil inquiries this has been considered a good ground of admission. *R. v. Eriswell*, 3 Term. Rep. 720; and it is said in *R. v. Marshall*, Carr. & M. 147, that Coleman, J., thought it a good ground in criminal cases also. It is not a sufficient ground of admission that the witness cannot be produced on account of his absence in a foreign country. *R. v. Austen*, 25 L. J., M. C. 48.

As to when a witness will be considered so ill as not to be able to travel, the following cases have been decided. Where the physician stated that the witness could not speak or hear from paralysis, and that if brought to court he would not be able to give evidence, yet that he might be brought there without danger to life, though he, as his physician, would not permit the witness to roam abroad if he knew it, it was held by the Court of Criminal Appeal that the deposition was rightly received. *R. v. Cockburn*, Dears. & B. C. C. 203. There may be incidents in regard to a state of pregnancy which may bring the case within the statute. *R. v. Stephenson*, 1 L. & C.

165; 31 L. J., M. C. 147; and see *R. v. Goodfellow*, 14 Cox, C. C. 326. It is in such case a question for the presiding judge in his discretion to determine whether the witness is so ill as not to be able to travel. *R. v. Wellings*, 3 Q. B. D. 426; 47 L. J., M. C. 100. Where a witness came to the assizes, but returned home by the advice of a medical man, who deposed that it would have been dangerous for the witness to remain, Parke, B., held that the witness was "unable to travel" within the meaning of this section, and allowed his depositions to be read. *R. v. Wicker*, 18 Jur. 252. A superintendent of police having seen a policeman in bed two days before the trial stated that he appeared ill, and that when he tried to get out of bed he could not stand, but he was unable to state what was the matter with him, except that he believed it to be rheumatics, and no medical man was called to be examined as to his condition. Held, that the deposition could not be admitted. *Per Piggott, B., R. v. Williams*, 4 F. & F. 515. The witness, Mary Lee, whose deposition it was proposed to read, lived not far from the court. Her medical attendant was called, and said, "I know Mary Lee; she is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous to her to be examined at all. I think she *71] *could distinguish between the court going to her house and she herself coming to the court." It was held by the Court of Crown Cases Reserved, that the deposition was not admissible, and Lord Coleridge, C. J., in giving judgment, said, "It would be dangerous to admit any such latitude of construction as would bring this case within the words of the statute." *R. v. Farrell*, L. R. 2 C. C. R. 116; 43 L. J., M. C. 94. See also *R. v. Welton*, 9 Cox, 281; *R. v. Bull*, 12 Cox, C. C. 31.

It is a question for the judge at the trial to determine whether the proof of a witness being so ill as not to be able to travel is sufficient; and the Court of Criminal Appeal will not interfere with the exercise of his discretion. *R. v. Stephenson*, 1 L. & C. 165; 31 L. J., M. C. 147. In *R. v. Farrell*, *supra*, the case was reserved for the Court by Coleridge, C. J., and not at the request of counsel. But see now *R. v. Wellings*, *ante*, p. 70.

There is nothing in the words of the statute which renders it necessary that the inability of the witness to attend at the trial should be permanent; it may, therefore, be implied that it need not be so. Before the statute, it seems to have been doubted whether a merely temporary illness was a sufficient ground for admitting the deposition. 2 Stark. Ev. 383, 3rd. ed.; *R. v. Savage*, 5 C. & P. 143, 24 E. C. L. And there can be no doubt that a judge would now exercise his discretion and decide whether, in the interests of justice, it were better to read the deposition, or to adjourn the trial in order to obtain the oral testimony of the witness. See *R. v. Tait*, 2 F. & F. 553, where Crompton, J., postponed the trial to the next assizes.

Condition of absent witness—how proved. Of course, a surgeon's certificate, however authentic in itself, is no legal evidence of the state of the witness. His condition must be proved on oath to the satisfaction of the judge who tries the case, whose province it is to decide this preliminary question of fact. It appears to be the established practice that, in the case of a witness being alleged to be ill, the surgeon, if he be attended by one, must be called to prove his condition. In *R. v. Riley*, 3 C. & K. 316, Patteson, J., laid it down, that where a witness is ill, his deposition would not be received in evidence under this statute, unless the surgeon attended at the trial to prove that the witness was unable to travel. And he also stated that where a witness was permanently disabled, and was not attended by a surgeon, other evidence that the witness was unable to travel was receivable. In that case, it appears that the witness was attended by a surgeon, who was not called; but another person proved that he saw the witness in bed on the 18th March, when he seemed ill; the commission-day was the 21st, and the trial took place on the 23rd; it was held that the proof was insufficient to render the deposition admissible. In *R. v. Philips*, 1 F. & F. 105, the attorney for the prosecution was put into the box to prove that the witness was unable to attend, and stated that the witness's residence was twenty-three miles off, and that he had seen him that morning in bed with his head shaved. Erle, J., said, "The evidence, no doubt, is as strong as it can be, short of that of a medical man, but the case may be easily imagined of a person extremely unwilling to appear as a witness, and so well feigning himself to be ill as to deceive any one but a medical man;" and the evidence was rejected.¹

Depositions, to be admissible, must be taken in proper form. To render *a deposition of any kind admissible in evidence in [*72 any case, it must be proved to have been formally taken.² Independently of the statute which regulates the taking of depositions before justices of the peace, 11 & 12 Vict. c. 42, s. 17, *supra*, they must appear to have been taken on oath, and that the party against whom they are tendered had an opportunity of examining the witnesses who made them. *Attorney-General v. Davison*, McClell. & Y. 169; *R. v. Woodcock*, 1 Lea. 500; *R. v. Dingler*, 2 Lea. 561. Now, not only these, but all the other requirements of the statute must be proved, by the party tendering the evidence, to have been complied with; though the usual presumptions in favor of the proceedings having been regular, will be made, if the depositions are in form correct.

Mode of taking depositions—caption. The title or caption of the deposition need state no more than that it is the deposition of the witness, and also the particular charge before the magistrate to which the deposition had reference. Where, therefore, upon the trial of a pris-

¹ *State v. Granville*, 34 La. An. 1088.

² The affidavit of the relatrix instituting the prosecution cannot be put in evidence at the trial. *Broyles v. State*, 64 Ind. 460.

oner for unlawfully obtaining a promissory note by false pretences, the deposition of the prosecutrix proved to have been regularly taken before the committing magistrate, stated, by way of caption, that it had been taken "in the presence and hearing of Harriet Langridge, (the prisoner), late of, etc., wife of John Langridge, of the same place, laborer, who is now charged before me this day for obtaining money and other valuable security for money from M. R. (the prosecutrix), then and there being the money of, etc.;" it was held, that such caption charged an offence against the prisoner with sufficient distinctness, and that the deposition had been properly received in evidence at the trial, after due proof of the absence of the prosecutrix from illness. *R. v. Langridge*, 1 Den. C. C. R. 448; 18 L. J., M. C. 198. One caption at the head of the body of the depositions taken in the case is sufficient, and the particular deposition sought to be given in evidence need not have a separate caption. *R. v. Johnson*, 2 C. & K. 355, 61 E. C. L. So where the depositions had one caption, which mentioned the names of all the witnesses, and at the end one jurat, which also contained the names of all the witnesses, and to which was the signature of the magistrate, and each witness signed his own deposition, Williams, J., was of opinion that they were correctly taken. *R. v. Young*, 3 C. & K. 106. A deposition without a caption is inadmissible, though otherwise formally taken. *R. v. Newton*, 1 F. & F. 641

Mode of taking depositions—opportunity of cross-examination. The prisoner must have an opportunity of cross-examining the witness. Where the prisoner was not present during the examination, until a certain part of the deposition, marked with a cross, at which period he was introduced, and heard the remaining part of the examination, and when it was concluded, the whole was read over to him; *Chambre, J.*, refused to admit that part of the depositions previous to the mark, which had not been heard by the prisoner. *R. v. Forbes*, Holt, 599 (n). But a different rule was acted upon in the following case. The prisoner was indicted for murder, and the deposition of the deceased was offered in evidence. It appeared that a charge of assault having been preferred against the prisoner, the deposition of the deceased had been taken *on that charge*. The prisoner was not present when the examination commenced, but was brought *73] into the room before the three last lines were taken down. The oath was again administered to the deceased in the prisoner's presence, and the whole of what had been written down was read over to him. The deceased was then asked, in the presence of the prisoner, whether what had been written was true, and he said it was perfectly correct. The magistrate then, in the presence of the prisoner, proceeded to examine the deceased further, and the three last lines were added to the deposition. The prisoner was asked whether he chose to put any questions to the deceased, but did not do so. An objection was taken that the prisoner had not been present. The deposition, however, was admitted, and by a majority of the judges held rightly

admitted. *R. v. Smith*, Russ. & Ry. 339; 2 Stark. N. P. 208, 3 E. C. L. In *R. v. Beeston*, Dears. C. C. 405, Alderson, B., stated that he still thought he was right in the objection which, as counsel for the prisoner, he took to the admissibility of the deposition in *R. v. Smith*, upon the ground that "the prisoner had not a sufficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answer and seeing his manner of answering, and that so much of the evidence as had been taken in the prisoner's absence was inadmissible." And Platt, B., in *R. v. Johnson*, 2 C. & K. 394, 61 E. C. L., reprobated the practice of taking depositions in the absence of the prisoner, and then supplying the omission by reading them over to the prisoner, and asking him if he would like to put any questions to the witnesses. The law presumes that if the prisoner was present he had a full opportunity of cross-examination, but this presumption may be rebutted. *R. v. Peacock*, 12 Cox, C. C. 21.¹

Mode of taking depositions—must be in presence of a magistrate. A person whilst before a magistrate had a full opportunity of cross-examining, and a note of the heads of the examination was taken by a clerk. Afterwards another clerk examined the witness from the notes so taken, and, in the absence of the magistrate, wrote down the answers and obtained the signatures of the witnesses. The prisoner's attorney was not there, though he might have been if he had liked, and the prisoner who was present was not asked if he would then cross-examine. The prisoner and witnesses were then taken before the magistrate, and the evidence taken before the clerk was read over to them. The prisoner was not then asked if he would cross-examine. The magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate signed the depositions. It was held by the Court for Crown Cases Reserved that the depositions were inadmissible, because they were not taken in accordance with the 11 & 12 Vict. c. 42, s. 17, but the argument of counsel was mainly directed to the point that the depositions were not taken in the presence of a magistrate. *R. v. Watts*, 9 Cox, C. C. R. 395; 33 L. J., M. C. 63; L. & C. 339.

Mode of taking depositions—should be fully taken and returned. By the 11 & 12 Vict. c. 42, s. 17, it is expressly enacted that the justice "shall in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the cases, and shall put the same into writing, and such depositions shall be read over and signed respectively by the *witnesses who shall have been so examined, and shall be signed [74 also by the justice or justices taking the same." The observations of Parke, B., in *R. v. Thomas*, 7 C. & P. 718, 32 E. C. L., are still pertinent. He said, "Magistrates are required by law to put down the evidence of witnesses, or so much thereof as shall be material.

¹ *Hurley v. State*, 29 Ark. 17.

They have hitherto in many cases confined themselves to what they deemed material, but in future it will be desirable that they should be extremely careful in preparing depositions, and should make a full statement of all the witnesses say upon the matter in question, as the experience we have already had of the operation of the Prisoner's Counsel Bill has shown us how much time is occupied in endeavoring to establish contradictions between the testimony of the witnesses and their depositions, in the omission of minute circumstances in their statements made before the magistrates, as well as in other particulars." Where there was an omission, in the depositions, of a conversation which was sworn to at the trial, and which the witness said he had told to the magistrate, Lord Denman, C. J., thought the complaint of the prisoner's counsel, that such omission was unfair to the prisoner, was well founded, and that the magistrate ought to have returned all that took place before him with respect to the charge, as the object of the legislature in granting prisoners the use of the depositions was, to enable them to know what they have to answer on their trial. *R. v. Grady*, 7 C. & P. 650, 32 E. C. L. The same learned judge expressed an opinion that although in a case of felony the committing magistrate need not bind over all the witnesses who have been examined before him in support of the charge, but only those whose evidence is material to the charge, it was very desirable that all which had been given in evidence before the magistrate should be transmitted to the judge. *R. v. Smith*, 2 C. & K. 207, 61 E. C. L. So also, in cases where the prisoner calls witnesses before the magistrate in answer to the charge, they should be heard, and their evidence taken down; and, if the prisoner be committed for trial, the depositions of his witnesses should be transmitted to the judge, together with the depositions in support of the charge. *Anon.*, 2 C. & K. 854, 61 E. C. L. And see now the 30 & 31 Vict. c. 35, s. 3, in Appendix of Statutes. If the prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate and returned to the judge. *R. v. Potter*, 7 C. & P. 650, 32 E. C. L. Nothing should be returned as a deposition against the prisoner, unless the prisoner had an opportunity of cross-examining the person making the deposition. *Per Lord Denman*, C. J., *R. v. Arnold*, 8 C. & P. 621, 34 E. C. L. But where a witness has undergone several examinations, it seems proper to return them all, although those only would be admissible in evidence against the prisoner which were taken in his presence. Thus, where a witness for the prosecution had made three statements at three different examinations, all of which were taken down by the magistrate, but the only deposition returned was the last taken after the prisoner was apprehended, and on the day he was committed; Alderson, B., said that every one of the depositions ought to have been returned, as it is of the last importance that the judge should have every deposition that has been made, that he may see whether or not the witnesses have at different times varied their statements, and if they have, to what extent they have done so. Magistrates ought to return to the

judge all the depositions that have been made at *all the examinations* *that have taken place respecting the offence which is to be the subject of a trial. *R. v. Simon*, 6 C. & P. 540, 25 E. C. L.; [*75 and whether for the prosecution or on the part of the prisoner. *Per Vaughan, J.*, *R. v. Fuller*, 7 C. & P. 269, 32 E. C. L.

Wilde, C. J., was of opinion that where a person of weak intellect was examined, the magistrate's clerk should take down in the depositions the questions put by the magistrate and the answers given by the witness as to the witness's capacity to take an oath. *R. v. Painter*, 2 C. & K. 319, 61 E. C. L.

Mode of taking depositions—signature. The depositions are by the 11 & 12 Vict. c. 42, s. 17, directed to be signed by the witnesses, and the magistrates before whom they are taken. It seems that the signature of one magistrate is sufficient (see the latter words of the section, *supra*, p. 69). No proof is necessary of the signature either of the magistrate or the witness. "It is the magistrate's duty to sign every deposition (the witness having first signed it) as the proceedings go on." *Per Lord Denman, C. J.*, *R. v. Lord Mayor of London*, 5 Q. B. 555, 48 E. C. L.; 13 L. J., M. C. 67; and if each deposition is signed it is immaterial that the deposition in question is written on more than one sheet of paper, so long as the last sheet of such deposition is signed by the justice. *R. v. Carroll*, 11 Cox, C. C. 322. Whether one signature by the magistrate at the foot of the whole body of the depositions is sufficient, has been much discussed. Where, before the passing of the 11 & 12 Vict. c. 42, a prisoner was charged with forging the acceptance to a bill of exchange of one Winter, who had died previous to the trial, the magistrate's clerk proved Winter's examination to have been duly taken in the prisoner's presence, and that he was cross-examined by his attorney; on the prosecutor's tendering the examination in evidence, it was discovered that, although the examination itself was duly signed by the magistrates, the cross-examination, which had been taken on a subsequent day, was not subscribed by them. The examinations, however, of two witnesses, called by the prisoner, and taken at the same time, were pinned up along with the cross-examination, and the last sheet of the whole was signed by the magistrates. Alderson, B. (after consulting Parke, B.), said that if the clerk could state that the sheets were all pinned together at the time the magistrate signed the last sheet, he thought he could not reject the examination of Winter in evidence, but must receive the whole in evidence. The clerk having no recollection of the subject, one of the magistrates, who happened to be in court, was called. He said that when he signed the depositions they were lying on the table, but he could not state they were pinned together. Alderson, B., thereupon rejected both the examination and cross-examination. *R. v. France*, 2 Moo. & R. 207. But where the depositions were on separate sheets, but under the one caption "Examination of J. J. Hill and others in the presence of the prisoner, etc.," and the whole were attached together, not at the time of signature, but subsequently by the

magistrate's clerk, Pollock, C. B., admitted them in evidence. *R. v. Lee*, 4 F. & F. 65. The schedule to the Act gives the following form of conclusion:—"the above depositions were taken before me, etc.," and where the depositions had been pinned together and the magistrate had signed the last sheet, Cockburn, C. J., overruling *R. v. Rickards*, 6 F. & F. 860, said the depositions were sufficiently signed, and Byles, *76] J., said, "the different sheets appear to *have been attached together at the time of the signature, and it can make no difference whether they were attached by a pin or in any other way as to the continuity of the piece of paper." *R. v. Parker*, L. R., 1 C. C. R. 225; 39 L. J., M. C. 60.

The mode of taking depositions of witnesses for the defence is regulated by the 30 & 31 Vict. c. 35, s. 3, see "Appendix of Statutes."

Depositions—for what purposes available. If the deposition be admissible at all, it is admissible for all the purposes for which ordinary evidence is admissible, and may be used either for or against the prisoner. It may be used before the grand jury in the same way as before the petty jury. *R. v. Clements*, 2 Den. C. C. 251; 20 L. J., M. C. 193.

Depositions—admissible on trial of what offences. Most of the cases which have actually occurred on this subject are those in which the inquiry before the magistrates has been into an injury done to the witness, which, from subsequent circumstances, has resolved itself into a more serious charge. The question has then arisen, whether, if the witness be unable to attend at the trial, his deposition is admissible, as having been given on a different charge from that then made. All the cases before the 11 & 12 Vict. c. 42, s. 17, were in favor of the admissibility of the deposition under such circumstances. In *R. v. Smith*, Russ. & Ry. 339, the prisoner was indicted for the murder of one Charles Stewart. The prisoner had been taken before the magistrate upon a charge of assault upon the deceased and also of robbing a manufactory, where the deceased was employed as night-watchman. At the trial the deposition of the deceased taken upon this inquiry was offered in evidence, and received by Richards, C. B. The matter was referred to the opinion of the judges, who held by a majority of ten to one that the deposition was rightly received in evidence. Four of the judges, however, stated that they should have doubted but for the case of *R. v. Radbourne*, 1 Lea. 458, which is to the same effect. It seems to have been thought that the 11 & 12 Vict. c. 42, s. 17, made some difference in this respect, and the deposition was rejected once or twice under similar circumstances, but in *R. v. Beeston*, Dears. C. C. 405, the subject was fully considered; there the prisoner was charged before the magistrate with feloniously wounding J. A. with intent to do him grievous bodily harm. J. A. subsequently died of the wound, and on the trial of the prisoner for the murder, the deposition of J. A. taken at the above inquiry was offered in evidence and received by Crompton, J. The point was reserved and fully argued before the Court of

Criminal Appeal, where it was unanimously held that the deposition in this case would have been admissible at common law, and that there was nothing in the statute by which the common law rule on the subject was affected. An opinion is expressed that the true guide in each case is not any technical distinction between the charge on which the deposition is taken and that on which the prisoner is ultimately tried, but whether the prisoner appears to have had a full opportunity of cross-examination on all points material to one charge as well as to the other; and see *R. v. Lee*, 4 F. & F. 63. This view has been taken lately in a charge of uttering a forged note, the original charge having been one of false pretences. *R. v. Williams*, 12 Cox, C. C. 101.

***Prisoners entitled to copies of the depositions taken before a magistrate.** By the Prisoner's Counsel Act, 6 & 7 Will. [*77 4, c. 114, s. 3, "prisoners were entitled to have copies of depositions, but this section would seem to be repealed and at all events similar provisions are contained in the 11 & 12 Vict. c. 42, s. 27, which enacts that "at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and shall be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed on payment of a reasonable sum for the same, not exceeding at the rate of three half-pence for each folio of 90 words;" see also 30 & 31 Vict. c. 35, ss. 3 & 4.

By s. 4 of 6 & 7 Will. 4, c. 114, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had." It seems doubtful whether this section is within the terms of the repealing clause 11 & 12 Vict. c. 42, s. 34.

It has been held by Littledale, J., and Parke, B., that a prisoner is not entitled to a copy of his own statement returned by the committing magistrate along with the deposition of the witnesses. *R. v. Aylett*, 8 C. & P. 669, 34 E. C. L. This decision is in conformity with the strict letter of the act, but it may be doubted whether it accords with the intention of the legislature. Where the case for the prosecution, as on the trial of Greenacre for murder, depends chiefly on contradictions of the prisoner's statement before the magistrate, it seems only reasonable that his counsel should be furnished with a copy of such statement. In the reporter's notes to the above case, it is suggested that at all events, according to the principles laid down by Littledale and Coleridge, JJ., in *R. v. Greenacre*, 8 C. & P. 32, and *post*, p. 79, 34 E. C. L., the judges being in the possession of the depositions, may direct their officer, if they think it will conduce to the ends of justice, to furnish a copy of the statement on application by the prisoner or his counsel. Although it is a matter for comment to the jury, yet it is no objection in point of law that the prisoner has had no intimation of the evidence

to be given against him. *R. v. Greenslade*, 11 Cox, C. C. 412; and as was suggested in the addenda to a former edition of the present work, it now appears that the report of the ruling to the contrary of Willes, J., in *R. v. Stignani*, 10 Cox, C. C. 552, is incorrect.

The statute does not apply to the case of prisoners committed for re-examination, but only to those who have been fully committed for trial. *Reg. v. The Lord Mayor of London*, 5 Q. B. 555; 13 L. J., M. C. 67. When therefore a prisoner had been committed to gaol until he should give sufficient sureties for keeping the peace and for appearing at the sessions to do as the court should order, it was held, on a rule for mandamus to justices to furnish copies of the depositions taken against him, that he was not entitled to them. *Ex parte Humphreys*, 19 L. J., M. C. 189.

Depositions taken before a coroner. It is enacted by the 7 Geo. 4, c. 64, s. 4, E., which repeals (as before stated) the 1 & 2 P. & M. c. 13, and by the 9 Geo. 4, c. 54, I., "That every coroner, upon any inquisition before him taken, whereby any person shall be indicted *78] *for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify and subscribe the same evidence and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court."

The 11 & 12 Vict. c. 42, s. 34, repeals so much of the 7 Geo. 4, c. 64, as relates to "the taking of bail in cases of felony, and to the taking of examinations and informations against persons charged with felonies and misdemeanors, and binding persons by recognizance to prosecute or give evidence." But as this act is said by its preamble to be intended to consolidate and amend the statutes relating to the duties of *justices of the peace*, it is not generally considered that the 7 Geo. 4, c. 64, is, as regards coroners, thereby affected.

What has already been said with respect to the admissibility of depositions taken before justices before the 11 & 12 Vict. c. 42, is for the most part applicable to depositions taken before coroners. In one respect, however, an important distinction has been taken between depositions before a magistrate and those taken before the coroner; the latter, as it is alleged, being admissible, although the prisoner was not present when they were taken. This is stated in a book of reputation, *B. N. P.* 242, on the authority of two cases, *R. v. Bromwich*, 1 Lev. 180, and *Thatcher v. Waller*, T. Jones, 53; see also 6 How. St. Tr. 776; 12 Id. 851; 13 Id. 561; but it is observed by

Mr. Starkie, 2 Evid. 385, 3rd ed.,¹ that in neither of these cases was the question considered upon plain and broad principles. It was also said by Mr. Justice Buller, in *R. v. Eriswell*, 3 T. R. 707, that depositions taken before the coroner, in the absence of the prisoner, are admissible. It has been observed, however, that his lordship did not, as it seems, intend to make a distinction between these depositions and those taken before a magistrate, but referred to *R. v. Radbourne*, 1 Leach, 457, as an authority, in which case the depositions were in fact taken *in the presence* of the prisoner. Lord Kenyon, also, in the same case, although he coincided in opinion with Buller, J., appears to have considered that depositions before a magistrate and before a coroner were on the same footing. 2 Stark. Ev. 385, 3rd ed. The reasons given in support of the distinction are, that the coroner's inquest is a transaction of notoriety, to which every one has access, 3 T. R. 722; and that as the coroner is an officer appointed on behalf of the public to make inquiry into matters within his jurisdiction, the law will presume the depositions before him to have been duly and impartially taken, B. N. P. 242. Hotham, B., is stated to have received depositions taken before the coroner, though it was objected that the defendant had not been present. *R. v. Purefoy*, Peak. Ev. 68, 4th ed. The authorities appear to be in favor of such evidence being admitted, but they are not very satisfactory. 2 Phill. Ev. 109, 10th ed. And a writer of high reputation has stated that the distinction between these depositions, and those *taken before a magistrate, is not warranted by the legislature, [79 and that as it is unfounded in principle, it may, when the question arises, be a matter of very grave and serious consideration, whether it ought to be supported. 2 Stark. Ev. 385, 3rd ed. This opinion has been adopted by another text-writer of eminence. 3 Russ. by Greaves, 4th ed. p. 479, 9th Amer. ed. by Sharswood. Mr. Phillipps also remarks, that as far as the judicial nature of the inquiry is important, it appears to be as regular for the coroner to take the depositions in the absence of the prisoner as it is for a justice to take the evidence in his presence. But although an inquiry by the coroner in the absence of the prisoner be a judicial proceeding, and required by the duty of his office, yet there seems no satisfactory reason why it should not be confined to its proper objects, or why the depositions should be received under circumstances which render every other kind of depositions taken judicially inadmissible, except by express statutory provision. And he adds, "and it seems an unreasonable and anomalous proposition to hold that on a trial for murder upon the coroner's inquest, a deposition taken before him, in the absence of the prisoner, is receivable in evidence; but that, if the trial takes place on a bill of indictment, a deposition so taken before a magistrate is not receivable. The same principle which excludes in the one case ought, if it is just and sound, to exclude also in the other." 2 Phill. & Arn. Ev. 109, 110, 10th ed. See *R. v. Wall*, 3 Russ. Cr. 5th ed. 534; by Greaves, 4th ed. p. 480, 9th Amer. ed. by Sharswood, and Taylor on Evidence, 479, 6th ed.

¹ See Tenth Amer. Ed., by Sharswood, 38.

Although the 7 Geo. 4, c. 64, s. 4, does not require the depositions of witnesses taken before a coroner to be signed, it is desirable that they should not only be so signed, but read over to the witnesses, before signature. See *per* Gurney, B., *R. v. Plummer*, 1 Car. & K. 608, 47 E. C. L. In *Reg. v. Biggadike*, *ante*, p. 61, Byles, J., admitted a statement made by the prisoner on oath, as a witness before the coroner, although it was not signed. The coroner was called and took the deposition down at the time. *R. v. Wiggins*, 10 Cox, C. C. 562.

The judges have power, by their general authority as a court of justice, to order a copy of depositions taken before a coroner to be given to a prisoner indicted for the murder of the party concerning whose death the inquisition took place, although the case is not one in which the coroner could have been compelled to return them under the 7 Geo. 4, c. 64, s. 4. *R. v. Greenacre*, 8 C. & P. 32, 34 E. C. L.

It seems that depositions, taken before a coroner, of a witness too ill to attend, may be sent before the grand jury. *R. v. Mooney*, 9 Cox, C. C. 411.¹

As to giving a witness's deposition in evidence against himself, if he is charged with a crime upon the same facts, see *supra*, pp. 60, 61.

Depositions in India by consent, etc. By the 13 Geo. 3, c. 63, s. 40, in cases of indictments or informations in the King's Bench, for misdemeanors and offences committed in India, that court may award a mandamus to the judges of the supreme court, etc., who are to hold a court for the examination of witnesses, and receiving other proofs concerning the matters in such indictment or information; and the examination publicly taken in court shall be reduced to writing, and shall be returned to the Court of King's Bench, in the manner directed by the act, and shall be there allowed, and read, and deemed as good evidence, as if the witness had been present. The provisions of this *80] section are extended by 6 & 7 Vict. c. 98, s. 4, to *all indictments or informations in the Queen's Bench for misdemeanors or offences committed against the acts passed for the suppression of the slave trade in any places out of the United Kingdom, and within any British colony, settlement, plantation, or territory.

And by 33 & 34 Vict. c. 52, s. 15, foreign warrants of arrest and copies of depositions shall be deemed to be duly authenticated, if authenticated in the manner following, that is to say, if the warrant of arrest purports to be signed by a judge, magistrate, or officer of the foreign state, in which the same shall have been issued, and if the copies of the depositions purport to be certified under the hand of a judge, magistrate, or officer to be true copies of the original depositions; and if the certificate or document of conviction purports to be certified by a judge, magistrate, or officer where the conviction took

¹ Such depositions are admissible on behalf of the accused. *State v. McNeil*, 33 La. An. 1332. But see *McClain v. Commonwealth*, 99 Pa. St. 86. Evidence taken before a coroner, when no crime is known to have been committed, and no person has been arrested, even if amounting to a confession, is admissible. *People v. Mondon*, 4 N. Y. Crim. Rep. 552.

place; and if in every case they are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice or some other minister of state; and all courts of justice and magistrates in her Majesty's dominions shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

Before this statute it was necessary to verify the correctness of the copies of the depositions by the oath of the witness who produced them. 1 Chit. Stat. 2nd series, 123.

Depositions with regard to prosecutions for offences committed abroad by persons employed in the public service, are regulated by statute 42 Geo. 3, c. 85.

Depositions are sometimes taken by consent in prosecutions for misdemeanors when the witness is about to leave the country. *R. v. Morphew*, 2 M. & S. 602; *Anon.*, 2 Chitty, 199. But if the trial comes on before the departure of the witness, or after his return, the depositions cannot be read. *Tidd*. 362; 2 *Phill. Ev.* 123, 10th ed. See *R. v. Douglas*, 13 Q. B. 42, 66 E. C. L.

Depositions under Merchant Shipping Act. By the 17 & 18 Vict. c. 104, s. 270, upon proof that a witness cannot be found in the United Kingdom, a deposition made out of the United Kingdom by him on oath in relation to the same subject-matter before any justice, etc., in presence of the accused, is admissible. The deposition must be authenticated by the signature of the judge, which need not be proved. The judge must certify that the accused was present. Where an officer of the Board of Trade after the examination of the official records stated that the ship of which the witnesses were officers had never been in this country, it was held sufficient evidence of their not being in the United Kingdom. *R. v. Conning*, 11 Cox, C. C. 134; *R. v. Anderson*, 11 Cox, C. C. 154; and see *R. v. Stewart*, 13 Cox, C. C. 296.

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*WHAT EVIDENCE IS PROPER TO THE ISSUES.

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NATURE OF THE ISSUE RAISED IN CRIMINAL CASES.

THE condition in which criminal pleadings now stand is somewhat peculiar. Indeed, so far as the prisoner is concerned, the pleadings are almost entirely useless, neither serving to inform him what the crime is for which he is about to be tried, nor as a record of the past, in case he should ever be put to the plea of *autrefois acquit* or *convict*. It is not the province of this work to discuss questions of criminal pleading, but to point out what evidence is necessary and what evidence is admissible upon a criminal indictment traversed by a plea of not guilty. And in order to do this it is essential first to discover what is the issue raised in such a case.¹

¹ The rule confining the evidence strictly to the point in issue is now rigidly applied in criminal cases. *Dyson v. State*, 26 Miss. 362. All facts upon which any reasonable presumption or inference can be founded, as to the truth or falsity of the issue, are admissible in evidence. *Richardson v. Royalton & Woodstock Turnpike Co.*, 6 Vt. 496; *Davis v. Calvert*, 5 G. & J. 269. A. and B., when riding in a gig, were robbed at the same time; A. of his money and B. of his watch, and violence used towards both. There was an indictment for robbing A. and another for robbing B. Little-dale, J., held, on the trial of the first indictment, that evidence might be given of the loss of B.'s watch, and that it was found on one of the prisoners, but that evidence could not be given of any violence offered to B. by the robbers. *Rooney's Case*, 7 C. & P. 517 a, 32 E. C. L. Evidence of a distinct substantive offence cannot be admitted in support of another offence; *a fortiori* cannot evidence of an intention to commit another offence be received. *Kinchelov v. State*, 5 Humph. 9. Although evidence

According to Lord Hale (2 Hale, P. C. 169), an indictment should be "a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature." Every one, however, knows the narrow rules of construction, which rendered the adoption of this liberal canon, even in Lord Hale's time, impossible (2 Hale, P. C. *193; rules [*82 which, by making it extremely difficult to draw indictments correctly, rendered the criminal law to a great extent nugatory; but such appeared to be the cruel severity of those laws, especially when contrasted with the mild manner in which, for the most part, criminal justice has in this country been administered, that men were only too glad, without much regard either to reason or logic, thus to nullify their effect, and *in favorem vitæ*, as it was called, to adopt the strangest rules of construing criminal indictments. But when the severity of the criminal code was relaxed, and men's eyes were no longer blinded by feelings of humanity, they saw at once the glaring nature of these fallacies, and they commenced a removal of them, at first warily, but eventually by a statute which, though of great practical value, yet by its somewhat vague and confused provisions, leaves the law, to say the least, in a very unscientific state.¹

Statutes relating to form of indictment. The statute alluded to is the 14 & 15 Vict. c. 100, which, by sect. 9, provides that "if upon

of one offence is not admissible for the purpose of proving the charge of another, yet it may be so connected with the proof of a relevant and material fact, that its introduction cannot be avoided. *Commonwealth v. Call*, 21 Pick. 515. Where a person was indicted as accessory before the fact to the crime of murder, and it appeared that the inducement to the murder was the exertions of the deceased to ascertain the perpetrators of a former murder, it was held competent to show the guilt of the prisoner as to the former murder, for the purpose of showing a motive for his conduct respecting the murder in question. *Dunn v. State*, 2 Pike, 229. The necessity for enforcing the rule that no evidence can be admissible which does not tend to prove or disprove the issue joined, is much stronger in criminal than in civil cases. *Hudson v. State*, 3 Cold. 355; *Wiley v. State*, Id. 362; *Lightfoot v. People*, 16 Mich. 507. [But see *Greenleaf on Evid.*, 13th edition, § 65 and note; *Brown v. Schock*, 77 Pa. St. 471.] Affirmative testimony is better than negative. *Dilk v. State*, 3 Head, 79. Evidence of transactions occurring subsequent to the finding of an indictment is *prima facie* irrelevant, and is only admissible in connection with evidence of previous transactions. *Smitheman v. State*, 40 Ala. 355. S.

Where a civil action is brought to recover damages for an act which is indictable as a crime, a preponderance of evidence only is necessary to a recovery. (*Overruling Barton v. Thompson*, 46 Ia. 30.) *Welch v. Jugenheimer*, 56 Ia. 11; *Wood v. Porter*, Id. 161; *Lewis v. Garretson*, Id. 278; *State v. McGlothlen*, Id. 544.

¹ A failure to prove an unnecessary averment cannot vitiate an indictment good without the averment. *United States v. Vickery*, 1 H. & J. 427. [So in an indictment for perjury, a slight variance between the complaint described and that offered in proof, which does not prejudice the defendant, is not ground to set aside the verdict. *Commonwealth v. Soper*, 133 Mass. 393.] An indictment will not be held defective or insufficient if enough remains to constitute it good after striking out the objectionable parts. *State v. Wall*, 39 Mo. 532. Facts not vital to the accusation and constituting merely matter of description, may be stated in an indictment as unknown to the grand jury, if such is the case. *People v. Bogart*, 35 Cal. 245. In murder "by some means, instruments and weapons to the grand jury unknown," held sufficient. *People v. Cronia*, 34 Cal. 191. S.

An allegation that one "did carry about his person a pistol," is supported by proof that he carried a pistol in his hand. *Woodward v. State*, 5 Tex. App. 296.

the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

By the 24 & 25 Vict. c. 96, s. 41, "if, upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

Sect. 12 of the 14 & 15 Vict. c. 100, enacts that, "if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court, before which such trial may be had, shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony; in which case such person may be dealt with in all respects as if had not been put upon his trial for such misdemeanor."

By the 24 & 25 Vict. c. 96, s. 72, upon the trial of any person
*83] *indicted for embezzlement where the facts amount to larceny, the jury shall be at liberty to return as their verdict, that such person is guilty of larceny, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for larceny, and *vice versa*; and no person so tried for embezzlement or larceny shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts. See the section set out in full, *post*, tit. Embezzlement.

By the 24 & 25 Vict. c. 96, s. 94, "If upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict

upon such indictment such of the said persons as shall be proved to have received any part or parts of such property."

Other statutes relating to the form of indictments, which affect the issues raised by them, are the 24 & 25 Vict. c. 94 (11 & 12 Vict. c. 46, s. 4), by which it is enacted, that an accessory before the fact to any felony may be *indicted* in all respects as if he were a principal felon; the 24 & 25 Vict. c. 100, s. 60, by which a woman indicted for the murder of her infant child may be found guilty of endeavoring to conceal its birth; the 24 & 25 Vict. c. 96, s. 88, by which a person indicted for obtaining property by false pretences shall not be acquitted of the misdemeanor if the facts amount to larceny;¹ the 14 & 15 Vict. c. 19, s. 5, by which a person indicted for feloniously wounding may be found guilty of unlawfully wounding only; and the 46 & 47 Vict. c. 51, s. 52, by which persons charged with corrupt practices may be found guilty of illegal practices.

Divisible averments. There is one rule of liberal construction applied to criminal indictments, which does not depend on recent legislation, and which stands in somewhat curious contrast to the general body of rules adopted in former times. It is generally known as the rule of divisibility of averments, and may be stated thus: that if in the indictment an offence is stated which includes within it an offence of minor extent and gravity of the same class, then the prisoner may be convicted on that indictment of the minor offence, though the evidence fail as to the major. Thus, upon an indictment for petit treason, if the killing with malice was proved, but not with such circumstances as to render the offence petit treason, the prisoner, might still have been found guilty of wilful murder upon that

¹ The power of the legislature to mould and fashion the form of an indictment is plenary; its substance, however, cannot be dispensed with. *State v. O'Flaherty*, 7 Nev. 153. [*McLaughlin v. State*, 45 Ind. 333. Where power of abridgment is given by statute, the same measure of evidence is necessary, as if the allegations were made in full. *Simpson v. State*, 59 Ala. 1.] Constitutional requisition as to conclusion of indictment imperative. *Williams v. State*, 27 Wis. 402. An indictment in which the usual mathematical signs are used in place of the words "degrees" and "minutes," is bad on demurrer. *State v. Jericho*, 40 Vt. 121. In drawing indictments figures should not be used for dates. *United States v. Prescott*, 2 Abb. U. S. 169. Abbreviations in setting out instrument. *State v. Jay*, 34 N. J. 368. Matters of inducement need not be set out in an indictment, with that degree of minuteness and particularity which is requisite in setting out the material allegations which constitute or give character to the offence charged. *State v. Mayberry*, 48 Me. 218. An indictment for an assault with intent to murder, need not state the means used. The circumstances showing the murderous intent are matters of evidence for the jury. *Harrison v. State*, 2 Cold. 232. The allegations as to the instrument of death, and the particular part of the body injured, need not be strictly proved. If the mode of applying the evidence is the same in kind, that will be enough, though the weapon or instrument used and the part of the body hurt are different. *State v. Jenkins*, 14 Rich. L. 215; *Witt v. State*, 6 Cold. 5. S.

On the caption of the indictment see *West v. State*, 48 Ind. 483. An indictment must appear by direct averment, to have been presented by a grand jury of the proper county. *State v. Hilton*, 41 Tex. 565; *Willey v. State*, 46 Ind. 363. A complaint which does not name any county is fatally defective. *People v. Gregory*, 30 Mich. 371. A mistake in the Christian name of the defendant does not vitiate an indictment where the name is correctly given therein at first. *Musquez v. State*, 41 Tex. 226. An indictment setting out the authority of an officer, must name the officer. *Commonwealth v. McMenamée*, 9 Phila. (Pa.) 596.

indictment. *R. v. Swan*, Foster, 104. So upon an indictment for murder, the prisoner may be convicted of manslaughter. *Gilb. Ev.* 262; *R. v. Mackalley*, 9 Co. Rep. 65 (b); Co. Litt. 282 (a).¹ And where a man was indicted on the statute of 1 Jac. 1, for stabbing, *contra formam statuti*, it was held, that the jury might acquit him upon the statute, and find him guilty of manslaughter at common law. *R. v. Harwood*, Style, 86; 2 Hale, P. C. 302. Where a man is indicted for burglary and larceny, the jury may find him guilty of the simple felony and acquit him of the burglary. 2 Hale, P. C. 302. So where the indictment was for burglary and larceny, and the jury found the prisoner guilty of stealing to the amount of 40s. in a dwelling-house (12 Ann. c. 7, repealed by 7 & 8 Geo. 4, c. 27), the judges were of opinion that by this verdict the prisoners were ousted of their clergy, the indictment containing every charge that was required by the statute. *R. v. Withal*, 1 Leach, 89; 2 East, P. C. 515, *84] ²stated *post*, tit. Burglary. *R. v. Compton*, 3 C. & P. 418, 14 E. C. L. So on an indictment for stealing in a dwelling-house, a person therein being put in fear, the prisoner may be convicted of the simple larceny. *R. v. Etherington*, 2 Leach, 671; 2 East, P. C. 635. Again, if a man be indicted for robbery, he may be found guilty of the larceny, and not guilty of the robbery. 2 Hale, P. C. 302. And in all cases of larceny, where, by statute, circumstances of aggravation subject the offender to a higher punishment, on failure in the proof of those circumstances, the prisoner may be convicted of the simple larceny. Thus, on an indictment for horse-stealing under a statute, the prisoner may be found guilty of a simple larceny. *R. v. Beaney*, Russ. & Ry. 416. But where upon an indictment for robbery from the person, a *special verdict* was found, stating facts which, in judgment of law, did not amount to a taking from the person, but showed a larceny of the party's goods; yet as the only doubt referred to the court by the jury was, whether the prisoners were or were not guilty of the felony or robbery charged against them in the indictment, the judges thought that judgment, as for larceny, could not be given upon that indictment, but remanded the prisoner to be tried upon another indictment. *R. v. Frances*, 2 East, P. C. 784. In *R. v. Jennings*, 1 Dears. & B. C. C. 447, the indictment charged that the prisoner, whilst the servant of A., stole the money of A. It appeared that the prisoner was not the servant of A., but the servant of B., and that the money which he stole was the money of B., but in the possession of A. as the agent of B.; the prisoner was convicted, and the court held the conviction good; saying that the allegation in the indictment as to the prisoner being a servant might be rejected as surplusage.² But where the prisoner was indicted under 24 & 25

¹ But where the evidence proves murder or nothing, it is error to instruct the jury that they may convict the prisoner of manslaughter. *Virgil v. State*, 63 Miss. 317.

² *State v. Grisam*, 1 Hayw. 12. On an indictment for an assault, with intent to murder, there may be a conviction of an assault simply. *State v. Coy*, 1 Atk. 181; *Stewart v. State*, 5 O. 241. [*Hunter v. Commonwealth*, 79 Pa. St. 503.] But on an indictment for murder there cannot be a conviction of an assault, with intent to murder, nor *vice versa*. *Commonwealth v. Roby*, 12 Pick. 496. (But see *Cooper's Case*, 15 Mass.

Vict. c. 99, s. 12, for the felony of uttering counterfeit coin after a previous conviction for a like offence, and the jury found him guilty of the uttering, but negatived the previous conviction, it was held that he could not be convicted of the misdemeanor of uttering, on the ground that on an indictment for felony there can be no conviction for misdemeanor, except by statutory enactment. *R. v. Thomas*, L. R. 2 C. C. 141; 44 L. J., M. C. 42, and see *post*, tit. Coining.¹

In misdemeanors as well as in felonies the averments of the offence are divisible. Thus in an information for a libel, it was stated that the defendants *composed, printed, and published* the libel; the proof extended only to the publication; but Lord Ellenborough held this to

187, where, on an indictment for a rape, the prisoner was convicted of an assault, with intent, etc.) [An indictment which charges that the defendant did assault with intent to commit murder, will sustain a judgment for a felony upon a verdict of guilty as charged in the indictment. *People v. Swenson*, 49 Cal. 388. An indictment which charges the defendant with the murder of three persons, charges three offences. *People v. Alibez*, 49 Cal. 452.] Nor of petit larceny, on an indictment for horse stealing. *State v. Spurgin*, 1 McCord, 352, nor upon an indictment for stealing can there be a conviction for receiving, etc. *Russ v. State*, 1 Black, 391; see *State v. Shepard*, 7 Conn. 54; *State v. Taylor*, 2 Bail. 49. A defendant cannot be convicted of an inferior degree of the same offence charged in the indictment, unless the lesser offence is included in the allegations of the indictment. *State v. Shoemaker*, 7 Miss. 177. [It is no defence to an indictment that the evidence shows that the defendant committed a higher offence than that charged. *Commonwealth v. Andrews*, 132 Mass. 263. Where defendant was charged with selling adulterated cream of tartar, and the prosecution elected to try him for the sale of it as a drug, proof that he sold it as an article of food will not sustain the indictment. *People v. Fulle*, 12 Abb. N. Cas. (N. Y.) 196. See *Patterson v. State*, 12 Tex. App. 222; *Commonwealth v. Luscomb*, 130 Mass. 42; *State v. Purify*, 86 N. C. 681; *Sumner v. State*, 74 Ind. 52; *Kinsman v. State*, 77 Id. 132.] Under an indictment for assault and battery, with intent to kill, the defendant may be convicted of a simple assault and battery. *State v. Steadman*, 7 Post. 495. Under an indictment with intent to commit murder or mayhem, the defendant cannot be convicted of an assault with intent to commit a bodily injury. *Carpenter v. People*, 4 Scam. 197. Under an indictment for procuring an abortion of a quick child, which is a felony by statute, the prisoner may be convicted of a misdemeanor, if the child were not quick. *People v. Jackson*, 3 Hill, 92. So on an indictment for rape, one may be found guilty of incest. *Commonwealth v. Goodhue*, 2 Mete. 193. So on an indictment for manslaughter, one may be found guilty of an assault and battery. *Commonwealth v. Drum*, 19 Pick. 479; *Commonwealth v. Hope*, 22 Id. 1. On an indictment for rape, a conviction may be had of an assault. *State v. Johnson*, 1 Vr. 155. A conviction cannot be had for robbery in the second degree when the indictment charges robbery in the first degree. *State v. Farran*, 38 Mo. 457. Under an indictment for rape, the defendant may be convicted of an assault, with intent to commit rape. *Prindeville v. People*, 42 Ill. 217. S.

Where the evidence clearly proves a stabbing as alleged in the indictment, it is not error to charge the jury that they must find a verdict of guilty or not guilty. *Ward v. State*, 56 Ga. 408. On an indictment for an assault in the second degree, the accused may be convicted, although the evidence shows an assault in the first degree. *People v. Sullivan*, 4 N. Y. Crim. Rep. 193.

¹ See Wharton Criminal Pleading and Practice, § 261, and notes. *State v. Durham*, 72 N. C. 447. The English law, which has been altered as to certain crimes, by statute, 1 Vict. c. 85, s. 11, is followed in some States. See *Wright v. State*, 5 Ind. 527; *State v. Valentine*, 6 Yerg. (Tenn.) 533. In Massachusetts it has been altered by statute. *Commonwealth v. Drum*, 19 Pick. (Mass.) 479; *Commonwealth v. Scannel*, 11 Cush. (Mass.) 547. See *Hunter v. Commonwealth*, 79 Pa. St. 503, as holding that the rule ceases with the reason of it. On an indictment charging a felony, there can be a conviction only of such a misdemeanor as is an essential ingredient of the felony. *Commonwealth v. Sliver*, 1 County Ct. Rep. (Pa.) 526. See *Dinkey v. Commonwealth*, 17 Pa. St. 126; *Commonwealth v. Solby*, 17 Weekly Notes Cases (Pa.) 392.

be sufficient. *R. v. Hunt*, 2 Camp. 584. So where an indictment charges that the defendant *did, and caused to be done* a certain act, as *forged and caused to be forged*, it is sufficient to prove either one or the other. *Per Lord Mansfield, R. v. Middlehurst*, 1 Burr. 400. Upon an indictment for obtaining money under false pretences it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient. *R. v. Hill*, Russ. & Ry. 190. So upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. *R. v. Rhodes*, 2 Raym. 886. So on an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy to prevent one workman from working. *R. v. Bykerdike*, 1 M. & Rob. 179. As to divisible averments in charges involving an assault, see tit. Assault.

With regard to the extent of the property as to which the offence has been committed, the averments in the indictment are divisible. *85] *Whatever quantity of articles may be stated in an indictment for larceny to have been stolen, the prisoner may be convicted if any one of those articles be proved to have been feloniously taken away by him. Where the prisoner was indicted under the 7 Geo. 3, c. 50 (repealed), for that he, being a post-boy and rider employed in the business of the post-office, feloniously stole and took from a letter a bank post bill, a bill of exchange for 100*l.*, a bill of exchange for 40*l.*, and a promissory note for 20*l.*, and it was not proved that the letter contained a bill of exchange for 100*l.*; the prisoner being convicted, it was held by the judges, that the statement in the indictment not being descriptive of the letter, but of the offence, the conviction was right. *R. v. Ellins*, Russ. & Ry. 188. In the same manner upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. *Per Holt, J.*, 1 Lord Raym. 149. So upon an indictment on the 9 Ann. c. 14, s. 5 (repealed), for winning more than 10*l.* at one sitting, Lord Ellenborough held, that the defendant might be convicted of winning a less sum than that stated in the indictment, though it would have been otherwise if the prosecutor had averred that the defendant had won bills of exchange of a specified amount. *R. v. Hill*, 1 Stark. N. P. 359. Where in an indictment for embezzling it was averred that the prisoner had embezzled divers, to wit, two bank notes for 1*l.* each, and one bank note for 2*l.*, and the evidence was, that he had embezzled one pound note only, this was held sufficient. *R. v. Carson*, Russ. & Ry. 303.

So where a party is charged with having committed the offence in two capacities, it would seem that proof of his employment in either is sufficient. Where a party was indicted in the first and third counts, as a "person employed in sorting and charging letters in the post-office," and it appeared that he was only a sorter and not a charger of letters, the judges were inclined to think that he might have been convicted on these counts by a special finding, that he was a sorter only. *R. v. Shaw*, 2 East, P. C. 580; see *post*, tit. Post-office.

So an indictment charging several persons with an offence, any one of them may be convicted. But they cannot be found guilty separately of separate parts of the charge. Where A. and B. were indicted under the statute of Anne for stealing in a dwelling-house to the value of 6*l.* 10*s.*, and the jury found A. guilty as to part of the articles to the value of 6*l.*, and B. guilty as to the residue, the judges held, that judgment could not be given against both; but that on a pardon or *nolle prosequi* as to B., it might be given against A. *R. v. Hempstead*, Russ. & Ry. 344.

The same is the case when, as sometimes occurs, more than one intent is laid in the indictment; in which case it is sufficient to prove any one that constitutes an offence. Thus on an indictment charging the defendant with having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendant had published the libel with *either* of those intentions, they ought to find him guilty. *R. v. Evans*, 3 Stark. N. P. 35, 3 E. C. L. So where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her, and the jury found that the prisoner assaulted the child with intent to *abuse her, but negatived the intention carnally to know her, [*86 *Holroyd, J.*, held, that the averment of intention was divisible, and the prisoner received sentence of imprisonment for twelve months. *R. v. Dawson*, 3 Stark. N. P. 62, 3 E. C. L. Where an intent is unnecessarily introduced in an indictment, it may be rejected. *R. v. Jones*, 2 B. & Ad. 611, 22 E. C. L.

Averments which need not be proved. By a strange inconsistency it was necessary under the old law to aver with great particularity both *time* and *place*; but in no case except where the offence was limited in respect of time or place need it have been proved as laid. *R. v. Townley*, Fost. 7; *R. v. Levy*, 2 Stark. N. P. 458, 3 E. C. L.; *R. v. Aylett*, 1 T. R. 63. Whether, where value was not of the essence of the indictment, it was ever necessary to aver it, is doubted by Hawkins (*Hawk. P. C.* bk. 2, c. 25, s. 75), "for any other purpose than to aggravate the fine."

Now by the 14 & 15 Vict. c. 100, s. 24, "no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, * * * nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or a day that never happened, * * * nor for want of the statement of the value,¹ or price of any matter or thing, or the amount of damage, injury, or spoil in any case where the value or price, or the amount of

¹ An indictment for burglary with intent to steal need not allege value of property. *Green v. State*, 21 Tex. App. 64.

damage, injury, or spoil is not of the essence of the offence." By the above section also it is no longer necessary to conclude an indictment *contra formam statuti*. *Castro v. The Queen*, 6 App. Cas. 229; 50 L. J., H. L. 417.

Notwithstanding these provisions, indictments frequently contain averments of time,¹ place, and value, although they be not; as the phrase is, of the essence of the offence. But the statement of them in no way restricts the proof which may be given under the indictment.

Amendment. The nature and intent of powers of amendment will be considered under the head of Practice. It is only necessary to notice them here, because the practical effect of them is that many variances between the evidence and the offence charged in the indictment are passed over without notice; it not being considered worth while to take an objection which would only produce an amendment. But the result is frequently to remove the offence for which the accused is ultimately tried still further from that with which he is apparently charged.

Effect of the above rules and provisions. It is evident that the effect of the above rules and provisions is materially to affect the nature of the issues raised by criminal pleadings. Frequently, indeed generally, a single count in an indictment traversed by a single plea of not guilty is capable of raising several issues more or less distinct from that which appears upon its face. No doubt the prosecutor will not be allowed to inquire into several felonies at the same time merely because they all fall within the words of the indictment; he will in general be put to his election upon which he will proceed. See *87] *post*, tit. Practice. But what is meant is that there may be several issues arising out of one count, any one of which may be selected for inquiry. In considering, therefore, what evidence is proper to the issue in criminal cases, we must always bear in mind that we are to look for the issue not in the mere words of the indictment, but coupling those words with the rules and provisions which we have just explained.

SUBSTANCE OF THE ISSUE TO BE PROVED AS LAID.

Bearing in mind what has just been said as to what the issue in criminal cases really is, the substance of the issue must be proved as laid. What follows must, of course, be taken subject to the powers of amendment above referred to, and it must also be recollected that in certain offences descriptive averments need only be of the most general kind by the provisions of statutes, other than those general statutes already alluded to, which will be noticed under the several offences to which they relate. But if the latitude thus allowed should not

¹ "At or prior to" is sufficient allegation as to time when the act is continuous. *People v. Buddensiek*, 4 N. Y. Crim. Rep. 230.

be taken advantage of in drawing the indictment, or the court should refuse, or not have the power to amend, then the following decisions become important.¹

The descriptive averments in an indictment are either of property, person, time, place, value, or mode of committing an offence. The decided cases in each of these averments will be given in their order.

Averments descriptive of property. Most of the cases of variance in the allegation and proof of property have occurred with respect to animals. In a case where the prisoner was indicted for stealing four live tame turkeys, it appeared that he stole them alive in the county of Cambridge, killed them there, and carried them into Hertfordshire, where he was tried. The judges held that the word *live* in the description, could not be rejected as surplusage, and that as the prisoner had not the turkeys in a live state in Hertfordshire, the charge as laid was not proved, and that the conviction was wrong. And Holroyd, J., observed that an indictment for stealing a dead animal, should state that it was dead; for upon a general statement that a party stole the animal, it is to be intended that he stole it alive. *R. v. Edwards, Russ. & Ry.* 497. On an indictment upon the 15 Geo. 2, c. 34 (repealed), which mentioned both *cows* and *heifers*, it was held that a beast two years and a half old, which had never had a calf, was wrongly described as a cow. *R. v. Cook*, 2 East, P. C. 616; 1 Leach, 105. The prisoner being indicted under the 9 Geo. 1, c. 22 (repealed),

¹ In general the affirmative of the issue is to be proved, but when the defendant is charged with an omission to do an act enjoined by law, such omission must be proved or some evidence given of it, although it involves the proof of a negative. *Commonwealth v. James*, 1 Pick. 375; *Jackson v. Shaffer*, 11 Johns. 613; *Hartwell v. Root*, 19 Johns. 345. If the charge consist in a criminal neglect of duty, as the law presumes the affirmative, the burden of proof of the contrary is thrown on the other side. But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative. *Story, J., in United States v. Hayward*, 2 Gall. 284. On an indictment for selling liquor without license, it lies on the defendant to prove his license. *Genning v. State*, 1 McCord, 573. [A statute dispensing with certain circumstantial allegations does not affect the evidence necessary to establish the inculpatory facts. *White v. State*, 11 Tex. App. 476.] When the defence is that the prisoner was under the age of presumed capacity, the onus lies upon the prisoner; if the age can be ascertained by inspection, the court and jury must decide. *State v. Arnold*, 13 Fred. 134. No general rule can be laid down respecting the comparative value of positive and negative testimony. *Denham v. Holeman*, 26 Ga. 182. If one witness of equal knowledge and credibility swears positively to a fact, and many swear negatively that they did not see or know the fact, the one witness swearing positively and not contradicted is to be believed in preference to the many. *Johnson v. State*, 14 Ga. 55; *Coles v. Perry*, 7 Tex. 109. The testimony of a witness, having a full opportunity of knowing that a person did not strike a blow, is affirmative evidence and entitled to weight as such. *Coughlin v. People*, 18 Ill. 266. When one witness swears that two men on horseback met, passed each other, and both wheeling had an angry conversation, and another witness swears that he saw the two men meet and pass each other, and that they did not wheel or converse together, and the judge charges that when one witness swears affirmatively and another negatively, the affirmative must prevail, such charge is inapplicable and erroneous. *State v. Gates*, 20 Mo. 400. On the trial of an indictment for selling liquors without a license, the docket and minutes of the County Commissioners before their records are made up, are admissible in evidence for the prosecution, and if no license appear it is *prima facie* that he had no license. *Commonwealth v. Kimball*, 7 Metc. 304. S.

for killing "certain cattle, to wit, one *mare*;" the evidence was, that the animal was a colt, but of which sex did not appear; the prisoner being convicted, the judges, on a case reserved, were of opinion that the words, "a certain mare," though under a *videlicet*, were not surplusage, and that the animal proved to have been killed, being a *colt* generally without specifying its sex, was not sufficient to support a charge of killing a mare. *R. v. Chalkley*, Russ. & Ry. 258. But where a statute mentions only the grown animal, the young is included, and it is no variance to describe the young animal as if it had been the grown animal. Thus, upon an indictment on the statute of 1 Edw. 6, c. 12, which mentioned the words "horses, geldings, and mares," it was held, that foals and fillies were included in those words, and that evidence of stealing a mare filly, supported an indictment *88] for stealing a mare. *R. v. Welland*, Russ. & Ry. 494. Probably every one of these cases would now be amended.¹

¹ An indictment for coining, alleged possession of a die made of iron and steel. In fact, it was made of zinc and antimony. The variance was held fatal. *Dorsett's Case*, 5 Rog. Rec. 77. An allegation in an indictment, which is not impertinent or foreign to the cause must be proved; though a prosecution for the offence might be supported without such allegation. *United States v. Porter*, 3 Day's Cases, 283. The court will be more strict in requiring proof of the matters alleged in a criminal than in a civil case. *Id.* In larceny of a gray horse, proof that it was a gray gelding, the variance held fatal. *Hooker v. State*, 4 O. 350. The acceptance of the name of property governs the description. *Case of Reed et al.*, 2 Rog. Rec. 168; *Commonwealth v. Wentz*, 1 Ash. 269. A charge that defendant set up and kept a *faro bank*, at which money was bet, lost, and won, is not sustained by proof that *bank notes* were bet, lost, and won. *Pryor v. Commonwealth*, 2 Dana, 298; see case of *Stone et al.*, 3 Rog. Rec. 3; *State v. Cassel*, 2 H. & G. 407. [Where in an indictment the character of money received is set forth, failure to prove such money is a fatal variance. *Williams v. People*, 101 Ill. 382.] An indictment for stealing a "horse" is not sustained by evidence of the theft of a "gelding." *Mashall v. State*, 31 Tex. 471; *Gholstan v. State*, 33 Id. 342. Property pledged and in the possession of the pledgee may be described as the property, and in the possession of the pledgor. *Commonwealth v. O'Hara*, 10 Gray, 469. An indictment for stealing the wearing apparel of a married woman, furnished by the husband, and which charges it to be the property of the wife cannot be sustained during the life of the husband. *State v. Hays*, 21 Ind. 288. An indictment for stealing "bank bills" declaring their value, in effect charges the bills to be genuine and upon solvent banks. *Munson v. State*, 4 Gr. 433. "A package of money containing the sum of sixty dollars in bank bills," held that there was no repugnancy. Bank bills which are current as a medium of exchange are money. *State v. Kube*, 20 Wis. 217. In an indictment for larceny of different articles of property described, it is not necessary to use the connecting word "and" between the different articles. *State v. Bartlett*, 55 Me. 200. [Under the Louisiana statute the character of the money stolen need not be described in an indictment for larceny. *State v. King*, 37 La. An. 91.] In arson not necessary to aver value of property burned. *Commonwealth v. Hamilton*, 15 Gray, 480. As to averment of ownership: see *Reed v. Commonwealth*, 7 Bush, 641; *Commonwealth v. Lawless*, 103 Mass. 425; *State v. Bell*, 65 N. C. 313; *Commonwealth v. Bowers*, 3 Brewst. 350. In an indictment for arson, the allegation of the ownership of the building burned is a part of the description of the offence; it must be direct and certain, and is insufficient if left to rest upon conjecture, or to be made out by argument. *People v. Myers*, 20 Cal. 76. [But a slight variance in regard to the ownership and value of the property within the building, which a Massachusetts statute requires to be set forth was held not to be a fatal variance. *Commonwealth v. Brailey*, 134 Mass. 527.] In arson true name of corporation must be stated. *McGary v. People*, 45 N. Y. 153. An indictment for adultery against a married woman should set forth the name of her husband. *Commonwealth v. Corson*, 4 Clark, 271. An indictment for receiving stolen property, need not give the name of the thief. *State v. Smith*, 37 Mo. 58. In arson to defraud insurance company, mere averment of company named insufficient. *People v. Schwartz*, 32 Cal. 160. Name

Averments descriptive of person. The name both Christian and surname of all persons mentioned in the indictment must, unless amended, be proved as laid. But if the name be that by which a person is usually called or known it is sufficient. The prisoner was tried for stealing the goods of Mary Johnson. The prosecutrix stated, that her original name was Mary Davis, but that she had been called and known by the name of Johnson for the last five years, and that she had not taken the name of Johnson for concealment or fraud; the judges were clearly of opinion that the time the prosecutrix had been known by the name of Johnson, warranted her being so called in the indictment, and that the conviction was right. *R. v. Norton, Russ. & Ry.* 510. So in a late case, where the prisoner was indicted for stealing the goods of *Richard Pratt*, and it appeared that his name was *Richard Jeremiah Pratt*, but he was equally well known by the name of *Richard Pratt*, it was ruled that the indictment was sustained. *Anon.*, 6 C. & P. 408, 25 E. C. L.; see also, *R. v. Berryman*, 5 C. & P. 601, 24 E. C. L. Where in an indictment a boy was called D., and he stated that his right name was D., but that most persons who knew him called him P., and that his mother had married two husbands, the first named P. and the second D., and that he was told by his mother that he was the son of the latter, and that she used always to call him D., *Williams, J.*, after consulting *Alderson, B.*, held that the evidence that the boy's mother had always called him D. must be taken to be conclusive as to his name, and that therefore he was rightly described in the indictment. *R. v. Williams*, 7 C. & P. 298, 32 E. C. L. Upon an indictment for the murder of a bastard child, described in the indictment as "*George Lakeman Clark*," it appeared it had been christened "*George Lakeman*," being the names of its reputed father; that it was called *George Lakeman*, and not by any other name known to the witnesses; and that the mother called it *George Lakeman*. There was no evidence that it had obtained, or was called by its mother's name of *Clark*. The judges held, that as this child had not obtained his mother's name by reputation, he was improperly called *Clark* in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction of the owner of stolen goods necessary. *Jones v. Commonwealth*, 17 Gratt. 563; *Hughes v. Commonwealth*, Id. 565. The owner may be a tenant in common. *Commonwealth v. Arrance*, 5 Allen, 517. In an indictment for breaking and entering a building with intent to commit a felony, the name of the owner of the building must be set out if known, and if not known then it should be so stated. The name of the owner of the property intended to be injured or stolen need not be averred. *State v. Morrissey*, 22 Ia. 158. To sustain an indictment for murder, it must be shown that the Christian name of the person killed, as given in the indictment, was his true name, or one by which he was to a considerable extent called and known among those who were acquainted with him. *State v. Lincoln*, 17 Wis. 579. An indictment for receiving stolen goods need not name the thief. *Commonwealth v. State*, 11 Gray, 60. S.

On the variance between a copy of a deed set forth in an indictment and the copy submitted in proof, see *Webster v. People*, 93 N. Y. 422. On variance in documents generally, see *Huddleston v. State*, 11 Tex. App. 22. Any variance as to the words of a document set forth in an indictment is fatal. *State v. Owens*, 73 Mo. 440. Unless such variance be mere fault of spelling. *People v. Cummings*, 57 Cal. 88. See on Forgery, *Burns v. Commonwealth*, 27 Grattan, (Va.) 934; *Sharley v. State*, 54 Ind. 168.

could not be supported. *R. v. Clark*, Russ. & Ry. 358. When an unmarried woman was robbed, and after the offence committed, but before the bill was presented to the grand jury, she married, and the indictment described her by her maiden name, this was held to be sufficient. *R. v. Turner*, 1 Leach, 536. Although where there are father and son of the same name, and that name is stated without any addition, it shall be *prima facie* intended to signify the father. *Wilson v. Stubbs*, Hob. 330; *Sweeting v. Fowler*, 1 Stark. 106, 2 E. C. L.; yet on an indictment containing the name without addition, it may be proved that either the father or son was the party intended. Thus on an indictment for an assault upon Elizabeth Edwards, it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; the defendant being convicted, the conviction was held good. *R. v. Peace*, 3 B. & A. 580, 5 E. C. L. So where an indictment laid the property of a house in J. J., it was held by Parke, J., to be supported by proof of property in Joshua *89] *Jennings the younger. R. v. Hodgson*, 1 Lew. C. C. 236; *per Bolland, B., R. v. Bland*, Id.¹

¹ Where the name alleged was *Harris*, the true name *Harrison*, though he was sometimes called by the former, it was held to be no variance. *State v. France*, 1 Over. 434. The law recognizes but one Christian name. *Franklin et al. v. Talmadge*, 5 Johns. 84. The courts will take judicial notice of the customary abbreviations of Christian names. *Stephen v. State*, 11 Ga. 225. When surnames with a prefix to them are ordinarily written with an abbreviation, the names thus written in an indictment are sufficient. *State v. Kean*, 10 N. H. 347. The addition of junior and the use of a middle letter forms no part of the name. *People v. Cook*, 14 Barb. 259; *McKay v. Speak*, 8 Tex. 376; *King v. Hutchins*, 8 Fost. 561; *Allen v. Taylor*, 28 Vt. 599; *State v. Mannery*, 14 Tex. 402; *People v. Lockwood*, 6 Cal. 205; *Thompson v. Lee*, 12 Ill. 242; *Erskine v. Davis*, 25 Ill. 251; *State v. Weare*, 38 N. H. 314. [But when it is set out it must be proved as laid. *State v. Chamberlain*, 75 Mo. 382. But see *Delphine v. State*, 11 Tex. App. 30.] Where the indictment charged that the defendant assaulted "Silas Melville," with intent to kill, and the proof was that his name was "Melvin," it was held a fatal variance. *State v. Curran*, 18 Mo. 320. As to the rule of *idem sonans*, see *Barnes v. People*, 18 Ill. 52; *Cruikshanks v. Comyns*, 24 Ill. 602; *State v. Havelly*, 21 Mo. 498. [Donnelly v. State, 78 Ala. 453. A variance in the spelling of the name of the foreman of a grand jury in the indorsement on the indictment is immaterial when "*idem sonans*," as Booth-Bootha. *Jackson v. State*, 74 Ala. 26.] Defendant known by one name as well as another may be indicted by either name. *Taylor v. Commonwealth*, 20 Gratt. 825. A man may have only one name. *Boyd v. State*, 7 Cold. 69. The word "alias" has been incorporated into the English language as equivalent to "otherwise called." *Kennedy v. People*, 39 N. Y. 245. Middle name not material. *State v. Williams*, 20 Ia. 98; *Miller v. People*, 39 Ill. 457; *Stockton v. State*, 25 Tex. 772. [Commonwealth v. O'Hearn, 132 Mass. 553. Unless set out in the indictment. *State v. Pease*, 74 Ind. 263.] W. R., Jr., may be indicted as W. R. "the second of that name." *Commonwealth v. Parmenter*, 101 Mass. 211. The rule of *idem sonans* applies where one indicted by the name of "McDonald" is tried by the name of "McDonell." *McDonald v. People*, 23 Wis. 410. So Thomson for Thompson. *State v. Wheeler*, 35 Vt. 261. In an indictment a Frenchman whose name was "Juli Antoine" was described as "Jules Antoine," held no variance. *Point v. State*, Shep. Sel. Cas. 54; s. c. 37 Ala. 148. [The indictment charged the defendant with killing De Oliver. The person killed was De Witt Oliver. Held no variance, especially as the point was not raised until after verdict. *Scott v. State*, 7 Lea (Tenn.) 232.] It is no variance in an indictment to set forth a name as "Droun" which is actually "Drown." *Commonwealth v. Woods*, 10 Gray, 477. Name in the indictment was Sensenderfer, real name Sensenderf, held a fatal variance. *Commonwealth v. Bowers*, 8 Brewst. 350. [Such a variance as Clements Turner for Turner Clements was held fatal. *Clements v. State*, 21 Tex. App. 258. So also Wood for Woods. *Neiderluck v. State*, 21 Tex. App. 320; *Kinney v. State*, Id. 348.] Where in an indictment for

An indictment is good, stating that the prisoner stole or received the goods of a person to the *jurors unknown*; but in case the owner of the goods be really known, an indictment alleging the goods to be the property of a person unknown, would be improper, and the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. 2 Hale, P. C. 621. Where the property was laid in one count as belonging to certain persons named, and in another as belonging to persons unknown, and the prosecutor failed to prove the Christian names of the persons mentioned in the first count; it was held by Richards, C. B., that he could not resort to the second count; and the prisoner was acquitted. *R. v. Robinson*, Holt, N. P. C. 595. An indictment against the prisoner as accessory before the fact to a larceny, charged that a *certain person to the jurors unknown*, feloniously stole, etc., and that the prisoner incited the said person unknown to commit the said felony. The grand jury had found the bill upon the evidence of one Charles Iles, who confessed that he had stolen the property, and it was proposed to call him to establish the guilt of the prisoner, but Le Blanc, J., interposed and directed an acquittal. He said he considered the indictment wrong, in stating that the property had been stolen by a person unknown, and asked how the witness, who was the principal felon, could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. *R. v. Walker*, 3 Camp. 264; see also *R. v. Blick*, 4 C. & P. 377, 19 E. C. L. But where an indictment stated that a certain person to the jurors unknown, burglariously entered the house of H. W., and stole a silver cream-jug, etc., which the prisoner feloniously received, and it appeared that amongst the records of indictments returned by the same grand jury, there was one charging Henry Moreton, as principal in the burglary, and the prisoner as accessory in receiving the cream-jug; that H. W.'s house had been entered only once, and that she had lost only one cream-jug, and that she had preferred two indictments;

murder, the name of the deceased was alleged to be Boudet or Bondet, when it was in fact Burdet, held that the variance was so slight as to be immaterial. *Aaron v. State*, Shep. Sel. Cas. 12; s. c. 37 Ala. 106. Initials are a sufficient designation of the Christian names of third persons, whose names are necessarily introduced into indictments. *State v. Black*, 31 Tex. 560; *Vandermark v. People*, 47 Ill. 122; *Kriel v. Commonwealth*, 5 Bush, 362. The person murdered may be described by the name by which he is commonly called and known, although differing from his name in baptism. *Commonwealth v. Desmarteau*, 82 Mass. 1. [So also the prisoner. *Alexander v. Commonwealth*, 15 W. N. C. (Pa.) 145.] It is sufficient if the person assaulted was as certainly known to friends and acquaintances of the vicinity by the name used in the indictment as any other. *Bell v. State*, 25 Tex. 574. In an indictment for larceny, wherein the property charged to have been stolen was alleged to have been "the property of one Eusebius Emerson, of Addison," and the proof was, that there were in that town two men of that name, father and son, and the property belonged to the son, who had usually written his name with *junior* attached to it; it was held that *junior* was no part of the name, and that the ownership as alleged in the indictment was sufficiently proved. *State v. Grant*, 22 Me. 171. S.

An indictment which alleged that money was obtained by two persons jointly on false pretences, is not sustained by proof of a loan to one of them, obtained by false pretences. *Commonwealth v. Pierce*, 130 Mass. 31. If property stolen is alleged to be that of W., and is proved to be that of W. & C., the variance is fatal. *People v. Frank*, 1 Idaho, 200.

it was held by the judges, that the prisoner was properly convicted, the finding of the grand jury on the bill, imputing the principal felony to H. M., being no objection to the other indictment. *R. v. Bush*, Russ. & Ry. 372. See also *R. v. Caspar*, 2 Moo. C. C. 101.¹

Where on an indictment upon the Black Act, for maliciously shooting A. Sandon, in the dwelling-house of *James Brewer* and *John Sandy*, it appearing in evidence that it was in the dwelling-house of *John Brewer* and *James Sandy*, the court said, that as the prosecutor had thought proper to state the names of the owners of the house where the fact was charged to have been committed, it was a fatal variance. The statute says, "Who shall maliciously shoot at any person, in any dwelling-house or other place," and the prosecutor having averred that it was in the house of *James Brewer* and *John Sandy*, was bound to prove it as it was laid. *R. v. Durore*, 1 Leach, 351; 1 East, P. C. 45. So where the indictment was for breaking, etc., the house of J. Davis, with intent to steal the goods of J. Wakelin, in the said house being, and there was no such person in the house, but J. W. was put by mistake for J. D., the prisoner was held entitled to an acquittal, and it was ruled that the words "J. W." could not be rejected as surplusage, since they were sensible and material, it being material to lay truly the property in the goods, without such words the description of the offence being incomplete. *R. v. Jenks*, 2 East, P. C. 514.

Before the extensive powers of amendment which now exist were conferred, a variance in names as laid and proved was got over by the rule of *idem sonans*, as it was called. Thus where the name in the indictment was *John Whyneard*, and it appeared that the real name was *Winyard*, but that it was pronounced *Winnyard*, the variance was held to be immaterial. *R. v. Foster*, Russ. & Ry. 412. So *Segrave* for *Seagrove*, *Williams v. Ogle*, 2 Str. 889. *Benedetto* for *Beniditto*, *Abithol v. Beniditto*, 2 Taunt. 401. But it would scarcely ever now be necessary to resort to this rule.

It has always been usual to treat the addition to a name as surplusage. Thus the prisoner was indicted (before the 39 & 40 Geo. 3, c. 67, the Act of Union) for stealing the goods of *James Hamilton, Esq.*, commonly called *Earl of Clanbrassil*, in the kingdom of Ireland; and it appeared that he was an Irish peer. The judges were of opinion that "*James Hamilton, Esq.*," was a sufficient description of the person and degree of the prosecutor, and that the subsequent words, "commonly called *Earl of Clanbrassil*, in the kingdom of Ireland," might be rejected as surplusage. But they conceived that the more correct and perfect mode of describing the person of the prosecutor

¹ Name unknown. *Commonwealth v. Sherman*, 13 Allen, 248. Name of person upon whom crime committed unknown to the grand jury, is sufficient, though it might with reasonable diligence have been ascertained. *Commonwealth v. Stodard*, 9 Allen, 280. Names of persons unknown not sufficient if they were in fact known, or could have been ascertained by the use of due diligence. *Check v. State*, 38 Ala. 227. If the name of a person on whom a crime has been committed is unknown to the informing officers it may be averred to be unknown, and it is not necessary to prove it. *State v. Wilson*, 30 Conn. 500. S.

would have been "James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland," and as that more perfect description appeared upon the face of the indictment, by considering the intervening words, "commonly called," as surplusage, they thought that the indictment was good. *R. v. Graham*, 2 Leach, 547; 1 Stark. C. P. 206. So where the prisoner was indicted for stealing the goods of A. W. Gother, Esq., Burrough, J., held that the addition of esquire to the name of the person in whom the property is laid, is mere surplusage and immaterial. *R. v. Ogilvie*, 2 C. & P. 230, 12 E. C. L.¹

Where a person has a name of dignity, that is the proper name by which to describe him, for it is the name itself and not an addition merely. *R. v. Graham*, *supra*; 3 Russ. Cri. 393, 5th ed. (n). It is usual to add the Christian names to the name of dignity, but Parke, B., said in *R. v. Frost*, 1 Dears. C. C. 474; 24 L. J., M. C. 61, that the name of dignity alone was sufficient.

Where the only evidence of the Christian name of the prosecutor was that of a witness who had seen him sign his name, it was held to be sufficient. *R. v. Toole*, Dears. & B. C. C. 194.

Here again the power of amendment would properly be freely exercised.

Averments descriptive of time. As has been said, in general, no time need be alleged in the indictment, or if alleged, need not be proved. But if it be of the essence of the offence, as in burglary, or the non-surrender of a bankrupt at the time appointed, then it must, subject to the power of amendment, be strictly proved as laid.² *R. v. Browne*, M. & M. 315.

Averments descriptive of place. In some particular cases it is necessary to prove the parish or place named in the indictment.³

¹ But in Rhode Island a plea in abatement, that there is an erroneous addition to the indictment. Thus, Mary Daly, "Spinster," is good, and the indictment must be quashed. *State v. Daly*, 14 R. I. 510.

² An indictment which does not allege the time or place of the offence charged is fatally defective. *State v. Slack*, 30 Tex. 354; *State v. Johnson*, 32 Tex. 96. Time not material if previous to indictment. *McBryde v. State*, 34 Ga. 202. [*City of Emporia v. Volmer*, 12 Kan. 622. But where the time proved varies from that laid, it must not be so remote as to let the statute of limitations intervene. *State v. Munson*, 40 Conn. 475.] An indictment charging the offence to have been committed at a date subsequent to the finding of it is bad. *State v. Noland*, 29 Ind. 212. Allegation of time of an offence continuing from day to day. *Commonwealth v. Fratis*, 82 Mass. 236. See also *State v. G. S.*, 1 Tyl. 295; *State v. Haney*, 1 Hawks. 460; *Jacobs v. Commonwealth*, 5 S. & R. 316; *United States v. Stevens*, 4 Wash. C. C. 547; *Commonwealth v. Harrington*, 3 Pick. 26. ["At or prior to" is a sufficient allegation as to time when the act is continuous. *People v. Buddensieck*, 4 N. Y. Crim. Rep. 230.] But in perjury charged to have been committed in the Circuit Court, held on the 19th of May, and the record shows the court to have been held on the 20th of May, the variance is fatal. *United States v. McNeal*, 1 Gall. 387. 8. [Compare *Hoerr v. State*, 4 Tex. App. 75; *Collins v. State*, 5 Tex. App. 37; *Brewer v. State*, 5 Tex. App. 248; *Williamson v. State*, 5 Tex. App. 485; *Hawthorne v. State*, 6 Tex. App. 562.]

³ As in an indictment for keeping a disorderly house. *McDonald's Case*, 3 Rog. Rec. 128. So in burglary, *Carney's Case*, Id. 44. *Quære*, in bigamy, where the first

Thus as in an indictment against a parish for not repairing a highway, the situation of the highway within the parish is a material *91] averment, see 2 Stark. C. P. 693 (n), 3 E. C. L., it must be proved as laid. So, if the statute upon which the indictment is framed, gives the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. 3 Russ. Cri. 403, 5th ed.; R. v. Glossop, 4 B. & A. 616, 6 E. C. L.

So where the offence is in its nature local, the name of the parish, or place must be correctly stated in the indictment, and proved as laid; as, for instance, on an indictment for stealing in the dwelling-house, etc., for burglary, for forcible entry, or the like.

Where an injury is partly local and partly transitory, and a precise local description is given, the local description becomes descriptive of the transitory injury, and should be proved as laid. 1 Stark. Ev. 466, 3rd ed., citing R. v. Cranage 3 Russ. Cri. 404, 5th ed.; 1 Salk. 385. So where the name of a place is mentioned, not as a matter of venue, but of local description, it should be proved as laid, although it need not have been stated. Thus where an indictment (under the repealed stat. 57 Geo. 3, c. 90) charged the defendant with being found armed, with intent to destroy game in a certain wood called the Old Walk, in the occupation of J. J., and it appeared in evidence that the wood had always been called the Long Walk, and never the Old Walk, the judges held the variance fatal. R. v. Owen, 1 Moo. C. C. 118.

Of course many such variances would now be got over by an exercise of the powers of amendment.

Averments descriptive of value. There are many cases in which the allegation of value is material, either because the value is of the essence of the offence, as in an indictment against a bankrupt for concealing or embezzling part of his estate to the value of 10*l.*; or as enhancing the punishment as in an indictment under the 24 & 25 Vict. c. 96, s. 60, for stealing in a dwelling-house, to the amount of 5*l.* But any error in this respect can generally be got over either by amendment, or by the rule of divisible averments; *supra*, p. 83.¹

marriage alleged to be in the State is in fact out of it. Ewen's Case, 6 Id. 65. S. [See People v. Calder, 30 Mich. 85.]

Where the evidence does not show in what county or State the alleged offence was committed, a judgment of conviction cannot be sustained. Stazey v. State, 58 Ind. 514. If the evidence fails to prove the venue as laid, *e. g.*, the county in which the crime is said to have been committed, there is ground for reversal. People v. Tarpey, 59 Cal. 371; State v. Inman, 76 Mo. 548; State v. McGinnis, 74 Mo. 245. It is not essential that a venue be established by positive testimony. It is sufficient if from the evidence the jury may reasonably conclude that the offence was committed in the county alleged. Hoffman v. State, 12 Tex. App. 406. But the venue of the crime must be established beyond a reasonable doubt. Gosha v. State, 56 Ga. 36. Whether a particular locality is or is not within a particular county is not a fact judicially known to the courts. Boston v. State, 5 Tex. App. 383.

¹ Inasmuch as a note given to a public officer to influence his official action is void as contrary to public policy, and is without consideration, it follows that an indictment against an officer, charging him with having received a promissory note for the

Averments descriptive of the mode of committing the offence. The description of the mode of committing the offence must be proved as laid, if not amended. But the substance only of such averments need be proved. 1 East, P. C. 341; 2 Hale, P. C. 185. Thus where the prisoner was indicted for administering to one H. M. G., a single woman, divers large quantities of the *decoction* of a certain drug called *savin*, with intent to procure the miscarriage of the said H. M. G.; and it appeared that the prisoner had prepared the medicine by pouring boiling water over the leaves of a shrub, a process which the medical witnesses stated was an *infusion*, and not a *decoction*, Lawrence, J., overruled an objection taken on this ground. He said that effusion and decoction were *ejusdem generis*, and that the question was, whether the prisoner administered any matter or thing with intent to procure abortion. *R. v. Phillips*, 3 Campb. 73, and see *post*, tits. Malicious Injuries and Murder. Where an indictment charged that A. gave the mortal stroke, and that B. & C. were present, aiding and abetting, if it appeared in evidence that B. was the person who gave the stroke, and that A. & C. were present, aiding and abetting, they may all be found guilty of murder or manslaughter, at common law, as circumstances may vary the case. The identity of *the person supposed to have given the stroke, is but a circumstance, and in this case a very immaterial one—the stroke of one [*92 being, in consideration of law, the stroke of all. The person giving the stroke is no more than the hand or instrument by which the others strike. *Foster*, 351; 1 Hale, P. C. 437, 463; 2 Id. 344, 345.

EVIDENCE CONFINED TO THE ISSUE.

We have considered what evidence is necessary; we have now to consider what evidence is admissible as relevant to the issue. Bearing in mind all that has been said as to the nature of the issue or issues raised by an ordinary criminal pleading, it may be laid down as a general rule, that in criminal, as in civil cases, the evidence shall be confined to the point in issue. In criminal proceedings it has been observed (3 Russ. Cri. 368, 5th ed.), that the necessity is stronger, if possible, than in civil cases, of strictly enforcing this rule; for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and matters relating thereto, which alone he can be expected to come prepared to answer. The importance of keeping evidence within certain prescribed grounds is greater now than before the alterations in criminal pleadings.¹

payment of money as a bribe, does not charge the receiving of a thing of value; and it is bad on a motion to quash. *State v. Walls*, 54 Ind. 561. See, also, *O'Brien v. State*, 6 Tex. 665; *Jackson v. State*, 43 Id. 421; *State v. Pearce*, 14 Fla. 153.

¹ The admission of evidence irrelevant to the issue, if prejudicial to the prisoner, is not cured by its being stricken out, where it is likely to influence the jury. *People v. Zimmerman*, 4 N. Y. Crim. Rep. 272.

No objection that other offences are disclosed. The notion that it is in itself an objection to the admission of evidence that it discloses other offences, especially where they are the subject of indictment, *R. v. Smith*, 2 C. & P. 633, 12 E. C. L., is now exploded. *R. v. Salisbury*, 5 C. & P. 155, 24 E. C. L.; *R. v. Clewes*, 4 C. & P. 221, 19 E. C. L.; *R. v. Richardson*, 2 F. & F. 343; and also, *R. v. Rearden*, 4 F. & F. 76; *R. v. Cobden*, 3 F. & F. 833; *R. v. Proud*, 1 L. & C. 97; and numerous other cases. If the evidence is admissible on general grounds, it cannot be resisted on this ground.¹

What evidence is admissible as referable to the point in issue. Of course all evidence bearing directly on any offence which can be, and is, under the indictment before the jury, made the subject of inquiry, is admissible.² So, also, and almost equally as a matter of course, evidence may be given, not only of the actual guilty act itself, but of other acts so closely connected therewith, as to form part of one chain of facts, which could not be excluded without rendering the evidence unintelligible. Thus in a case cited by Lord Ellenborough, in *R. v. Whiley*, 2 Lea, 985; 1 New Rep. 92, where a man committed three burglaries in one night, and stole a shirt at one place and left it at another, and they were all so connected that the court heard the history of all

¹ On an indictment for a conspiracy in inveigling a young girl from her mother's house, and reciting the marriage ceremony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been released on *habeas corpus*, was allowed to be given in evidence. *Commonwealth v. Hevice et al.*, 2 Y. 144. So on an indictment against a man for killing his wife, the prosecutor has been allowed to prove an adulterous intercourse between the prisoner and another woman, not to prove the *corpus delicti*, but to repel the presumption of innocence arising from the conjugal relation. *State v. Watkins*, 9 Conn. 47. S. [See *State v. Folwell*, 14 Kan. 105; *State v. Underwood*, 75 Mo. 230. But the prosecution cannot draw out by cross-examination of a witness for the defence, that the accused stands indicted for other offences. *Hamilton v. State*, 34 Ohio St. 82. Nor can it put in evidence the commission of any other offence in order to prove the *corpus delicti*. *Sutton v. Johnson*, 62 Ill. 209; *People v. Justice of Special Sessions*, 10 Hun, (N. Y.) 158. Where the accused in conversation has admitted the crime, and another offence, the whole conversation is admissible. *State v. Underwood*, 75 Mo. 230.]

² On the trial of an indictment for burning a stable, evidence that the measurement of certain tracks which led from the stable towards defendant's house, had been applied to the foot of the brother of the defendant, who had been first arrested for the offence, and that the measurement did not correspond, is not admissible. *State v. England*, 78 N. C. 552. Nor is evidence admissible that the accused had been previously imprisoned as a pickpocket. *Cesure v. State*, 1 Tex. App. 19; *Loza v. State*, Id. 488. Evidence that another committed the offence for which the defendant is tried is inadmissible. *State v. Beverly*, 88 N. C. 632; *State v. Baxter*, 82 Id. 602. Even when admissions of that other. *State v. Smith*, 35 Kan. 618. So on a trial for assault on A., with intent to murder, where the defence was that B., not the prisoner, made the assault, evidence of threats of B. against A. are inadmissible. *Boothe v. State*, 4 Tex. 202; *Crookham v. State*, 5 W. Va. 510; *State v. Beaudet*, 53 Conn. 536. The fact that the insured had been tried and acquitted on a criminal charge of arson, is of no weight in a suit on the policy where the defence is arson. *Sibley v. St. Paul Fire and Marine Insurance Co.*, 9 Bissell, C. Ct. 31. Upon the trial of a person jointly indicted with another, the prosecution will not be permitted to show that the latter is in the penitentiary of another State. *State v. English*, 67 Mo. 136. On a trial for larceny, evidence of the bad character of those who frequent a warehouse from which the property was stolen, but who are unconnected with the case, either as defendants or witnesses, is foreign to the issue and immaterial. *Bennett v. State*, 52 Ala. 370.

three burglaries; Lord Ellenborough remarked that "if crimes do so intermix, the court must go through the detail." So where the prisoner was charged with setting fire to a rick, evidence was allowed to be given that he had set fire to two other ricks, belonging to different persons, at the same time and place. *Per Gurney, B., R. v. Long*, 6 C. & P. 178, 25 E. C. L. The prisoner, who had been in the employ of the prosecutrix, was indicted for stealing six shillings; the son of the prosecutrix, suspecting the prisoner, had marked a quantity of money, and put it into the till, and the prisoner was *watched by him; on the first examination of the till it contained 11s. 6d. The prosecutrix's son having received another shilling from a customer, put it into the till; and another person having paid a shilling to the prisoner, he was observed to go to the till, to put in his hand and to withdraw it clenched. He then left the counter, and was seen to raise his clenched hand to his waistcoat pocket. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when it was objected that this would be to prove several felonies. The objection being overruled, the prosecutrix's son proved that, upon each of the several inspections of the till, after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been convicted, the Court of King's Bench, on an application for staying the judgment, were of opinion that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts which were all part of one entire transaction, *R. v. Ellis*, 6 B. & C. 145, 13 E. C. L. In *R. v. Firth*, 38 L. J., M. C. 54, L. R. 1 C. C. R. 172, the abstraction of gas from a pipe for several years was considered to be one transaction; and it seems that even if there were separate takings yet they would afford evidence of the felonious nature of one separate taking.

In some cases the offence itself consists of a series of transactions, as on indictments for barratry, keeping a common bawdy-house, being a common utterer, conspiracy, and other cases. In all these cases, of course, evidence of any act is admissible which goes to make up the offence.¹ In *R. v. Welman, Dears*, C. C. 188; 22 L. J., M. C. 118, a case of false pretences, the evidence showed that the prisoner in July, 1850, called upon the prosecutrix and made false representations relative to a benefit club, but failed on this occasion to obtain any money. In August of the same year the prisoner again called relative to the club, and referred to the previous conversation. It was held, on a case reserved, that it was for the jury to say whether these conversations were so connected as to form one continuing representation; and that if so, they might connect them.

Sometimes evidence which would be otherwise inadmissible becomes so either as serving to identify the prisoner, or some article in his possession, connected with the commission of the crime. Thus, in an in-

¹ An interval between two successive entrances of the same house on the same night by the same burglar does not prevent proof of what took place at the second visit. The two visits form one continuous burglary. *People v. Gibson*, 58 Mich. 368.

dictment for arson, evidence has been admitted to show that property which had been taken out of the house at the time of the fire, was afterwards discovered in the prisoner's possession. *R. v. Rickman*, 2 East P. C. 1035. So where upon an indictment for robbing A., there being another indictment against the prisoners for robbing B. of a watch, it appeared that A. and B. were travelling in a gig, when they were stopped and robbed. Littledale, J., held that evidence might be given that B. lost his watch at the same time and place that A. was robbed, but that evidence was not admissible of the violence that was offered to B. One question in the case was, whether the prisoners were at the place in question when A. was robbed, and as proof that they were, evidence was admissible that one of them had got something which was lost there at the time. *R. v. Rooney*, 7 C. & P. 517, 32 E. C. L. So upon an indictment for stabbing, in order to identify the instrument, evidence may be adduced of the shape of a wound given to another person by the prisoner at the same time, although such wound be the subject of another indictment. Per Gaselee, J., and Parke, J., *R. v. Fursey*, 6 C. & P. 81, 25 E. C. L.¹

*94] ***Evidence to explain motives and intention.** Had the matter stopped here there would have been little difficulty; but there are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of. This cannot be done merely with the view of inducing the jury to believe that because the prisoner has committed a crime on one occasion, he is likely to have committed a similar offence on another; *R. v. Cole*, 1 Phill. Ev. 508, 10th ed.; but only by way of anticipation of an obvious defence; see *R. v. Richardson*, *infra*, p. 101; such as that the prisoner did the act of which he was accused, but innocently and without any guilty knowledge; or that he did not do it, because no motive existed in him for the commission of such a crime, or that he did it by mistake. In these cases it is competent for the prosecutor to adduce evidence which, under other circumstances, would not be admissible; such as the conduct of the prisoner on other occasions, his admissions, and other surrounding circumstances, in order to show, as the case may require, either that his ignorance was extremely improbable, or that he had ample motives of advantage or revenge for the commission of the crime,¹ or that it was improbable he should make a mistake.

¹ So testimony that the ground where the deceased was struck was covered with stone or pieces of rock, is admissible on behalf of the defendant where the character of the wound in the skull indicated that it could not have been produced with the fist. *Caw v. People*, 3 Neb. 357.

² Testimony of the prisoner's guilt, or participation in the commission of a crime, wholly unconnected with that for which he is put on his trial, cannot, as a general rule, be admitted. *Dunn v. State*, 2 Ark. 229; *Commonwealth v. Call*, 21 Pick. 515. [*Sutton v. Johnson*, 62 Ill. 209. But see *Gossenheimer v. State*, 52 Ala. 313. The prosecution has the right to offer any evidence tending to prove a motive for the com-

There are three classes of offences in which, from the nature of the offence itself, this species of evidence is so frequently necessary that they will

mission of the crime. *State v. Larkin*, 11 Nev. 314. Such as the fact of a quarrel between the defendant and prosecutor, but not the cause of the quarrel. *State v. Hannett*, 54 Vt. 83. Evidence of a different offence is admissible to show the intent *e. g.* that the prisoner altered the marks on a hog, to show that he stole it. *State v. Thomas*, 30 La. An. 600. If evidence of a separate offence is wrongly admitted, without objection by the defendant, the jury cannot consider it. *Endally v. State*, 39 Ark. 278. Where an indictment charges several offences of the same nature but there is only evidence of one distinct offence, the proof should be confined thereto. Evidence of one substantive offence cannot be admitted in support of another. *Fields v. Wyoming Ter.*, 1 Wy. Ter. 78.] Where it is shown that a crime has been committed, and the circumstances point to the accused as the perpetrator, facts tending to show a motive, although remote, are admissible in evidence. The jury, however, cannot be too cautious with respect to the importance they attach to this species of testimony. *Baalam v. State*, 17 Ala. 451; *State v. Ford*, 3 Strob. 517. [*People v. Hensler*, 48 Mich. 49. So also facts showing that the act charged is part of a system. *Kramer v. Commonwealth*, 87 Pa. St. 299; *Carrol v. Commonwealth*, s. c. 4 W. N. C. (Pa.) 109; *Somerville v. State*, 6 Tex. App. 433.] In cases where the *scienter* or the *quo animo* constitutes a necessary part of the crime charged, as in cases of forgery, murder, and the like, testimony of such acts or declarations of the prisoner as tend to prove such knowledge or intent, is admissible, notwithstanding they may constitute in law a distinct crime. *Dunn v. State*, 2 Ark. 229; *Thorp v. State*, 15 Ala. 749. [See *Goerson v. Commonwealth*, 99 Pa. St. 388; *Curtis v. State*, 78 Ala. 12; *People v. Gray*, 66 Cal. 271; *People v. Haver*, 4 N. Y. Crim. Rep. 171.] In a case of murder, evidence was offered that the accused, on the same day the deceased was killed, and shortly before the killing, shot a third person; it was held that the evidence was competent, though it went to prove a distinct felony, as it appeared to be connected with the crime charged, as parts of one entire transaction. *Heath's Case*, 1 Harr. 507; *Reynolds v. State*, 1 Kelly, 222. But not without such connection. *Cole v. Commonwealth*, 5 Gratt. 696; *Baker v. State*, 4 Ark. 56. [*Sartin v. State*, 7 Lea (Tenn.) 679; *Miller v. Commonwealth*, 78 Ky. 15; *State v. Vines*, 34 La. An. 1079; *State v. Lapage*, 57 N. H. 245; *State v. Martin*, 74 Mo. 547. See *Fernandez v. State*, 4 Tex. App. 419; *Shaffner v. Commonwealth*, 72 Pa. St. 60.] Evidence of the state of feeling existing between the prisoner and the accused, or of facts from which such state of feeling may be inferred, is competent on an indictment for murder. *State v. Zellers*, 2 Hals. 220; *People v. Hendrickson*, 1 Park. C. R. 406. [*Boyd v. State*, 4 Baxter (Tenn.), 319.] On the trial of a husband for the murder of his wife, the will of his father-in-law was admitted in evidence, to show that the expectations of property which he might have entertained, had been disappointed. *Henrickson v. People*, 1 Park. C. R. 406. When a man was indicted for the murder of his wife, evidence that he had been for some time living in adultery with another woman, was admitted. *State v. Watkins*, 9 Conn. 47. It is never indispensable to a conviction that a motive for the commission of the crime should appear. *People v. Robinson*, 1 Park. C. R. 644. When aggravating matter is the immediate consequence of the offence for which the defendant is on trial, it may be shown; but if it is a distinct crime, not necessarily connected with that offence, it cannot be received. *Baker v. State*, 4 Ark. 56. In an action for a conspiracy to defraud A., by falsely representing B. to be a man of credit, evidence that such representations were made to others, in consequence of which such other persons made the same representations to A., is admissible. *Gardner v. Preston*, 2 Day's Cases, 205. To prove fraud against the defendant, a transaction between him and a third person, of a similar nature to the one in question, may be given in evidence. *Snell et al. v. Moses et al.*, 1 Johns. 99. See also, *Rankin v. Blackwell*, 2 Johns. Cas. 193. In an indictment for obtaining goods by false pretences, it is allowable to prove that the same pretences were used to another. *Collin's Case*, 4 Rog. Rec. 143. Where a party is charged with fraud in a particular transaction, evidence may be offered of similar previous fraudulent transactions between him and third persons; and wherever the intent or guilty knowledge of a party is material to the issue of a case, collateral facts tending to establish such intent or knowledge are proper evidence. *Bottomley v. United States*, 1 Story, 135. [*State v. Emery*, 76 Mo. 348; *Lindsay v. State*, 38 O. St. 507.] On the trial of a criminal prosecution, when the facts and circumstances offered in evidence amount to proof of a crime other than that charged, and there is ground to believe that the crime charged grew out of it, or was caused by it, such facts and circumstances may be admitted to show

be considered separately ; these are conspiracy, uttering forged instruments and counterfeit coin, and receiving stolen goods. In these the act itself which is the subject of inquiry is almost always of an equivocal kind, and from which *malus animus* cannot, as in crimes of violence, be presumed ; and almost the only evidence which could be adduced to show the guilt of the prisoner would be his conduct on other occasions. Though it must be acknowledged that in the two first of these the crown, being often directly interested, has succeeded in pushing the rules of evidence to their extremest severity against the prisoner. For further illustrations of this subject in reference to arson, see tit. Arson, *post*.

Evidence to explain motives and intention—Conspiracy. The evidence in conspiracy is wider than, perhaps, in any other case, other principles as well as that under discussion tending to give greater latitude in proving this offence. See tit. Conspiracy, *post*. Taken by themselves the acts of conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances. Thus, on the trial of an indictment against several persons for a conspiracy in unlawfully assembling for the purpose of exciting discontent or disaffection, as the material points for the consideration of the jury are the general character and intention of the assembly, and the particular case of the defendant as connected with that general character, it is relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner and acting in concert. It is relevant also to show, that early on the day of the meeting on a spot at some distance from the place of meeting (from which spot bodies of men came afterwards to the place of meeting), a great number of persons, so organized, had assembled, and had there conducted *95] themselves in a riotous, disorderly, or seditious manner. *R. v. Hunt*, 3 B. & Ald. 566 at pp. 573, 574, 5 E. C. L. Upon the same principle on the trial of a similar indictment, it is relevant to produce in evidence resolutions proposed by one of the defendants at a

the *quo animo* of the accused. *Commonwealth v. Ferngan*, 8 Wr. 386. [But only for the purpose of showing a motive for the particular act charged in the indictment. *Brown v. State*, 26 O. St. 176. Or for the purpose of identification. *Curtis v. State*, 78 Ala. 12. But evidence of defendant's possession of other cattle than the one alleged to have been stolen is admissible to establish the identity of the herd in which the stolen cow was found. *Tyler v. State*, 13 Tex. App. 205. And where a defendant on trial for stealing a horse, at the time of his arrest, on being questioned told where the saddle was, this fact is competent evidence as tending to establish his guilt. *Speights v. State*, 1 Tex. App. 551. Where defendant has shown that he acquired certain cattle properly, evidence that another steer in the same herd was stolen is admissible. *People v. Cunningham*, 66 Cal. 668.] Whatever shows motive is admissible. *Flanagan v. State*, 46 Ala. 703; *McKenzie v. State*, 26 Ark. 334; *Hunter v. State*, 43 Ga. 483; *Williams v. People*, 54 Ill. 422; *Shelton v. State*, 34 Tex. 662. 8.

On an indictment for obtaining money on false pretences, evidence of having obtained money at other times from other persons by similar pretences held inadmissible. *Strong v. State*, 86 Ind. 208. Where one is on trial for the commission of a crime, evidence of a harmless intent in going to the place where the alleged offence was committed is irrelevant. *Commonwealth v. Blair*, 123 Mass. 242.

large assembly in another part of the country for the same professed object and purpose as were avowed at the meeting in question; and also, that the defendant acted at both meetings as president or chairman; for, in a question of intention, it is most clearly relevant to show, against that individual, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. *R. v. Hunt*, 3 B. & Ald. 573, 5 E. C. L.¹

¹ *Commonwealth v. Crowninshield*, 10 Pick. 497; *American Fire Co. v. United States*, 2 Pet. 364; *Snyder v. Lafromboise*, 1 Bree. 269; *Commonwealth v. Eberle*, 3 S. & R. 9; *Wilbur v. Strickland*, 1 R. 458; *Reitenback v. Reitenback*, Id. 362; *Martin v. Commonwealth*, 2 Leigh, 745; *Gardner v. Preston*, 2 Day's C. 205; *Collins v. Commonwealth*, 3 S. & R. 220; *Ex parte Bollman & Swarowout*, 4 Cr. 75; *Livermore v. Herschell et al.*, 3 Pick. 33; *Rogers v. Hall*, 4 W. 359; *Gibbs v. Nedy*, 7 W. 305; *Colt et al. v. Eves*, 12 Conn. 243. Upon the trial of an indictment for conspiracy where evidence has been given which warrants the jury to consider whether the prisoner was engaged in the alleged conspiracy, and had combined with others for the same illegal purpose, any act done or declaration made by one of the party, in pursuance and promotion of the common object, are evidence against the rest; but what one of the party may have said not in pursuance of the plot, cannot be received against the others. *State v. Simons*, 4 Strob. 266. Where there is evidence of conspiracy, the declarations of any of the parties are evidence against the others. *Cornelius v. Commonwealth*, 15 B. Mon. 539; *Johnson v. State*, 29 Ala. 62; *Browning v. State*, 3 Miss. 656; *Patton v. Ohio*, 6 O. St. 467; *Fonts v. State*, 7 Id. 471; *Hightower v. State*, 22 Tex. 605; *Clinton v. Estes*, 20 Ark. 216; *State v. Ross*, 29 Mo. 32; *State v. Nash*, 7 Clarke, 347; *Draper v. State*, 22 Tex. 400; *Rice v. State*, 7 Ind. 332. [*State v. Ford*, 37 La. An. 443; *Brandt v. Commonwealth*, 94 Pa. St. 290; *Williams v. State*, 47 Ind. 568; *Lathrop v. Bramhall*, 3 Hun. (N. Y.) 394; *Smith v. State*, 52 Ala. 407; *Kelly v. People*, 55 N. Y. 565; *People v. Estrado*, 49 Cal. 171.] The declarations of one man cannot be given in evidence against another until it is proved that they were engaged in a common enterprise. *Malone v. State*, 8 Ga. 408; *Commonwealth v. Eberle*, 3 S. & R. 9; *Gardner v. People*, 3 Scam. 84; *State v. Loper*, 4 Shep. 293. [*State v. Miller*, 35 Kan. 328; *O'Neil v. State*, 42 Ind. 348; *People v. Gorham*, 16 Hun. (N. Y.) 93; *Hamilton v. People*, 29 Mich. 173; *Ganor v. State*, 60 Miss. 147; *Ormsby v. People*, 53 N. Y. 472.] To make such declarations competent, it is sufficient that the conspiracy has been testified to by a witness who is competent; the court will not decide on his credibility. *Commonwealth v. Crowninshield*, 10 Pick. 497; *Hunter's Case*, 7 Gratt. 641. After the commission of the act is complete, declarations subsequently made by an accomplice are good evidence against himself only, unless made in the presence of his partners in the crime. *Hunter's Case*, 7 Gratt. 641. [*U. S. v. McKee*, 3 Dill. 546; *State v. Arnold*, 48 Ia. 566. But where there was a conspiracy to cause a marriage falsely to appear of record, with intent to prevent another marriage, a letter proved to be written by one of the defendants offering to prove the marriage void for \$500, is admissible on the question of motive, and as an admission that there was no legal marriage. *Commonwealth v. Waterman*, 122 Mass. 43.] When the conduct of several persons shows them to have been joint conspirators, the declarations of one may be given in evidence against another. *Glory v. State*, 8 Eng. 238. [Even though they be indicted separately. *Taylor v. State*, 3 Tex. App. 169; *State v. Stevens*, 67 Ia. 557; *Grogan v. State*, 63 Miss. 147.] That when evidence has been given of a conspiracy, the acts and declarations of the several conspirators are evidence against each other. See *Lee v. Lamprey*, 43 N. H. 13; *Jones v. Hurlburt*, 39 Barb. 403; *Preston v. Bowers*, 13 O. St. 1; *Page v. Parker*, 43 N. H. 463; *State v. Myers*, 19 Ia. 517; *Hudson v. Commonwealth*, 2 Duv. 531; *Jones v. Commonwealth*, Id. 554; *People v. Pitcher*, 15 Mich. 397; *State v. Dula*, 1 Phill. 211; *Street v. State*, 43 Miss. 1; *People v. Trim*, 39 Cal. 75; *Commonwealth v. Corties*, 3 Brews. 575; *Mason v. State*, 42 Ala. 532; *Ake v. State*, 30 Tex. 466; *Spencer v. State*, 31 Tex. 64; *Commonwealth v. Thompson*, 99 Mass. 444; *Sands v. State*, 21 Gratt. 871. S. U. S. v. McKee, 3 Dill. 546; *Commonwealth v. Scott*, 123 Mass. 222.

As to what constitutes *prima facie* evidence of a conspiracy, see *Ormsby v. People*, 53 N. Y. 472. Where there is evidence of a conspiracy to extort money by suit against defendant, he may put in evidence the statements of plaintiff's husband, even when made in the absence of the plaintiff. *Mawich v. Elsey*, 47 Mich. 10.

Evidence to explain motives and intention—Uttering forged instruments or counterfeit coin. There is no case in which this kind of proof is more used than in indictments for uttering forged instruments or counterfeit coin, by far the most difficult point being to ascertain whether the prisoner did so innocently or with a guilty knowledge of what he was about. The following cases have been decided under this head.

The prisoner was charged with uttering a bank of England note, knowing it to be forged; evidence was offered for the prosecution that the prisoner had uttered another note forged in the same manner, by the same hand, and with the same materials, three months previously, and that two ten pound notes and thirteen one pound notes of the same fabrication, had been found on the files of the company, on the back of which there was the prisoner's handwriting, but it did not appear when the company received them. This evidence was admitted, but the case was referred to the opinion of the judges, the majority of whom were of opinion that it was admissible, subject to observation, as to the weight of it, which would be more or less considerable, according to the number of the notes, the distance of the time at which they had been put off, and the situation of life of the prisoner, so as to make it more or less probable that so many notes could pass through his hands in the course of business. *R. v. Ball, Russ. & Ry. 132; 1 Campb. 324.* The prisoners were indicted for uttering bank notes, knowing them to be forged. The trial took place in April, and to prove their guilty knowledge, evidence was given that in February they had uttered, on three several occasions, forged bank notes to three different persons, and that on being asked at each place for their names and places of abode, they gave false names and addresses; and the court was of opinion that this evidence was admissible. Lord Ellenborough said, that it was competent for the court to receive evidence of other transactions, though they amounted to distinct offences, and of the demeanor of the prisoner on other occasions, from which it might fairly be inferred that the prisoner was conscious of his guilt whilst he was doing the act charged upon him in the indictment. Heath, J., said, "The charge in this case puts in proof the *knowledge* of the person, and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances." *R. v. Whiley, 2 Leach, 983; 1 New Rep. 92.*

Not only is evidence of the act of passing other forged notes admissible to prove the prisoner's guilty knowledge, but proof of his general demeanor on a former occasion will be received for the same *96] *purpose. The prisoner was indicted for forging and knowingly uttering a bank note, and the question was, whether the prosecutor, in order to show that the prisoner knew it to be forged, might give the conduct of the prisoner in evidence, that is, whether from the conduct of the prisoner upon one occasion, the jury might not infer his knowledge on another, and all the judges were of opinion that such evidence ought to be received. *R. v. Tattershall, cited by Lord Ellenborough, 2 Leach, 984.*

It is not necessary that the other forged notes should be of the same description and denomination as the note in question. *R. v. Harris*, 7 C. & P. 429, 32 E. C. L. The point was doubted in *R. v. Millard*, R. & R. 245; but in *R. v. Ball*, 1 Moo. C. C. 470, the prisoner was indicted for forging and uttering a note in the Polish language. In support of the *scienter* the prosecutor gave evidence of the particulars of a meeting at which the prisoner agreed with the prosecutor (who was an agent of the Austrian government, and had been sent over to endeavor to detect persons implicated in the forgeries of Austrian notes) to make him 1000 Austrian notes for fifty florins. This evidence was objected to on the part of the prisoner, as it was a transaction relative to notes of a different description from the notes in the indictment, besides which no Austrian notes were in fact made. Littledale, J., however, admitted the evidence, and the prisoner was found guilty, but judgment was respited, that the opinion of the judges might be taken, who held the evidence admissible. And the case of *R. v. Foster*, *infra*, p. 98, supports the same view; for the same principle would apply to indictments for uttering forged instruments as to indictments for uttering counterfeit coin.

Whether evidence is admissible of uttering other forged instruments where these are uttered subsequently to that with which the prisoner is charged seems to some extent doubtful.¹ In one case the prosecutors offered to prove the uttering of another forged note five weeks *after* the uttering, which was the subject of the indictment; but the court (Ellenborough, C. J., Thompson, C. B., and Lawrence, J.) held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the *same manufacture*. *R. v. Taverner*, Carr. Sup. 195, 1st ed.; 4 C. & P. 413 (n), 19 E. C. L. Where in an indictment for uttering a bill with a forged acceptance, knowing it to be forged, it being proposed, for the purpose of proving the guilty knowledge, to give in evidence other forged bills of exchange *precisely similar*, with the same drawers' and acceptors' names, uttered by the prisoner about a month after the uttering of the bill mentioned in the indictment, Mr. Justice Gaselee, after consulting Alexander, C. B., was disposed to allow the evidence to be received, but said that he would reserve the point for the opinion of the judges, upon which the counsel for the prosecution declined to press the evidence. *R. v. Smith*, 4 C. & P. 411, 19 E. C. L. See *R. v. Foster*, *infra*, p. 98. The prisoner was a stamp distributor of the Queen's Bench in Ireland. In the process of stamping, a second sheet placed inadvertently

¹ Under an indictment for having a counterfeit bank-bill with intent to pass it, evidence that the defendant subsequently had in his possession other and different counterfeit bank-bills is admissible to show guilty knowledge and intent. *Commonwealth v. Price*, 10 Gray, 472. Evidence of a prisoner's endeavors to engage a person to procure for him counterfeit money; of his declared intention to become acquainted with a counterfeiter, and to remove to a place near his residence, is admissible on a prosecution for passing a counterfeit note to prove the *scienter*. *Commonwealth v. Finn*, 5 Rand. 701. In treason, where the defendant had enlisted under the enemy, proof was admitted that he had attempted to prevail on another to enlist, to show the *quo animo*. *Resp. v. Malin*, 1 Dall. 33. See *People v. Lagrille*, 1 Wheel. C. C. 415.

beneath the sheet to be stamped receives an impression. These second sheets are called blinds. These the prisoner obtained and sold. The defence was that he obtained them innocently (though the person giving them to him might be fraudulent). To meet this defence evidence was admitted of several documents with similar blinds, and identified by the prisoner's mark, and it was held they were rightly *97] *admitted as evidence of guilty knowledge. *R. v. Colclough*, 15 Cox, C. C. Ir. 92.

But no doubt there would be some limits both as to time and circumstances beyond which evidence of uttering forged instruments on other occasions would not be permitted. What these limits are it is for the judge in his discretion to determine; they will probably be wider in forgery and coining than in some other cases, receiving stolen goods for instance. *R. v. Green*, 3 C. & K. 209; see also *per* Lord Tenterden, C. J., in *R. v. Whiley*, 2 Lea. 983; 1 New Rep. 92; and *R. v. Lult*, 3 F. & F. 834; and see as to cases of false pretences, *post*, p. 101.

The possession also of other forged notes by the prisoner is evidence of his guilty knowledge. The prisoner was indicted for uttering a bill of exchange upon Sir James Esdaile and Co., knowing it to be forged. It was proved that, when he was apprehended, there were found in his pocket-book three other forged bills, drawn upon the same parties. On a case reserved, the judges were all of opinion, that these forged bills found upon the prisoner at his apprehension were evidence of his guilty knowledge. *R. v. Hough*, Russ. & Ry. 120. In order, however, to render such evidence admissible, it must, it seems, be first satisfactorily proved that the other notes were forged, and they ought to be produced. *R. v. Millard*, Russ. & Ry. 245; *R. v. Cooke*, 8 C. & P. 586, 34 E. C. L.; and see *R. v. Forbes*, 7 C. & P. 224, 32 E. C. L., *post*, tit. Forgery. See, too, *R. v. Brown*, 2 F. & F. 559. It would seem that presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received. 1 Phill. Ev. 511 (n), 10th ed. As to the non-production of a chattel, see *R. v. Francis*, L. R. 2 C. C. 128; 43 L. J., M. C. 97, *ante*, p. 2.

On the trial of indictments for uttering or putting off counterfeit coin, knowing it to be counterfeit, it is the practice, as in cases of forgery, to receive proof of more than one uttering, committed by the party about the same time, though only one uttering be charged in the indictment.¹ 1 Russ. Cri. 233, 5th ed.; 2 Id. 728. In *R. v. Whiley* (see *ante*, p. 95), it was stated by the counsel for the prisoner, in argument, that upon an indictment for uttering bad money, the proof is always exclusively confined to the particular uttering charged in the indictment. Upon this, Thompson, B., observed, "As to the cases put by the prisoner's counsel of uttering bad money, I by no means agree in

¹ On an indictment for passing a counterfeit silver dollar, knowingly, evidence that defendant had counterfeited silver dollars, was held not admissible. *State v. Odell*, 2 Const. Rep. 758. But on an indictment for counterfeiting money, evidence of possession of instruments of coining is admissible. *State v. Antonio*, Id. 776. In prosecutions for having counterfeit notes in possession, proof that other counterfeits were found secreted in prisoner's house is admissible. *Hess v. State*, 5 O. 5. S.

their conclusion, that the prosecutor cannot give evidence of another uttering on the same day, to prove the guilty knowledge. Such other uttering cannot be punished, until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer*; but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad." 2 Leach, 986. Also proof of the prisoner's conduct in such other utterings (as, for example, that he passed by different names) is for the same reason clearly admissible. See *R. v. Tattershall*, *ante*, p. 96; *R. v. Phillips*, 1 Lew. C. C. 105. Such evidence, far from being foreign to the point in issue, is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge, and it would seldom be possible to ascertain under what *circumstances the uttering took place (whether with ignorance [*98 or with an intention to commit fraud), without inquiring into the demeanor of the prisoner in the course of other transactions. 1 Phill. Ev. 511, 10th ed.

And the point is now finally settled that evidence of uttering counterfeit coin on other occasions than that charged is evidence to show guilty knowledge; and that utterings after that for which the indictment is laid may be given in evidence for this purpose as well as those which take place before. Thus in *R. v. Foster*, 24 L. J., M. C. 134, the Court of Criminal Appeal held, that on an indictment for uttering a counterfeit crown piece knowing it to be counterfeit, proof that the prisoner, on a day subsequent to the day of such uttering, uttered a counterfeit shilling, was admissible to prove the guilty knowledge of the prisoner. "The uttering of a piece of bad silver," said the court, "although of a different denomination from that alleged in the indictment, is so connected with the offence charged, that the evidence of it was receivable." It is to be observed that this case also shows that the coins uttered need not be the same on each occasion. See as to the latitude to be allowed in this respect, *ante*, p. 95.¹

Evidence to explain motives and intention—Larceny and receiving stolen goods. With regard to the case of a receiver of stolen goods, it has been frequently held that as the question is one entirely of guilty knowledge, evidence of receiving other goods of a

¹ *State v. Houston*, 1 Bail. 300; *State v. Hooper*, 2 Bail. 27; *Martin v. Commonwealth*, 5 Leigh, 707. But the notes must be produced, or proved to be destroyed, or in the defendant's possession, and not produced on notice. *People v. Lagrille*, 1 Wheel. C. C. 415; *Helm's Case*, 1 Rog. Rec. 46; *Case of Smith et al.*, 4 Id. 106. [See *State v. Breckenridge*, 67 Ia. 204.] So if the passing of the other note be at a remote period, it is not sufficient. *Dougherty's Case*, 3 Id. 148. But proof of the *scienter* is not admissible, before the principal charge is established. *Jones's Case*, 6 Id. 86. S.

That proof of the possession of other stolen property is admissible to show intent, see *Conley v. State*, 21 Tex. App. 495.

similar nature, stolen from the same prosecutor, may be given; even though indictments are pending for the other larcenies. But it appears that the other occasions on which the stolen property was received must not be so far removed in point of time as to form entirely different transactions. Where, upon an indictment for receiving it, it appeared that the articles had been stolen, and had come into the possession of the prisoner at several distinct times, the judge, after compelling the prosecutor to elect upon which act of receiving he would proceed, told the jury, that they might take into their consideration the circumstance of the prisoner having the various articles of stolen property in her possession, and pledging, or otherwise disposing of them at various times, as an ingredient in coming to a determination, whether, when she received the articles for which the prosecutor elected to proceed, she knew them to have been stolen. *R. v. Dunn*, 1 Moody, C. C. 146. But where the prisoner being indicted in one count for stealing certain cloth, in another for receiving, knowing it to have been stolen, it was proved that the cloth was stolen in the night of the 2nd and 3rd March, and found in the possession of the prisoner on the 10th March; and it was sought further to give in evidence, in order to show guilty knowledge, that on his house being searched on 10th March, other cloth which had been stolen in the December previous from other parties, was found; the Court of Criminal Appeal held that such evidence was admissible. Alderson, B., in giving his judgment, said, "The mere possession of stolen property is evidence *prima facie* not of receiving but of stealing; and to admit such evidence in the present case would be to allow a prosecutor, in order to make out that a prisoner had *received property*, with a guilty knowledge, which had been stolen in *March*, to show that the prisoner had in the *December* previous *stolen* some other property from another place and belonging to other persons. In other words, we are asked to say, that in order to show that the prisoner had committed one felony, * 99] the prosecutor may prove that he committed a totally different felony, some time before; such evidence cannot be admissible." *R. v. Oddy*, 2 Den. C. C. R. 264; 20 L. J., M. C. 198. In *R. v. Nicholls*, 1 F. & F. 5, the prisoner was indicted for receiving a quantity of lead knowing it to have been stolen. Cockburn, C. J., allowed evidence to be given that on several occasions, between the early part of January and the 11th of February, the prisoner, in company with another person, had sold lead stolen from the same place, and taken a share of the money. By the Prevention of Crimes Act, 34 & 35 Vict. c. 112, s. 19, "evidence may be given at any stage of the proceedings that there was found in the possession of the person charged other property stolen within the period of twelve months, and where evidence has been given that the stolen property has been found in his possession, then, if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given." The section will be found, *post*, Receiving of Stolen Goods. The finding of other stolen property within twelve months in the possession of the prisoner

may be given in evidence against him, although such other property is the subject of another indictment to be tried at the same assizes. *R. v. Jones*, 14 Cox, C. C. 3, *per Lopes*, J. It must be shown that the other stolen property was actually in possession of the prisoner at the time when he was found in possession of the property the subject of the indictment. *R. v. Drage*, 14 Cox, C. C. 85, *per Bramwell*, L. J. (*R. v. Carter*, 12 Q. B. D. 522.)

Evidence to explain motives and intention—General cases. Except with reference to the offences already alluded to, the question of how far evidence is admissible to explain motives and intention has not been very fully discussed. In *R. v. Egerton*, Russ. & Ry. 375, the prisoner was indicted for robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime. Evidence was admitted by Holroyd, J., that the prisoner had made another, but ineffectual, attempt to obtain a 1*l.* note from the prosecutor on the following day to that on which he obtained the coat; and it is said that this ruling was confirmed by the judges. In *R. v. Voke*, Russ. & Ry. 531, the prisoner was indicted for maliciously shooting at the prosecutor. Evidence was given that the prisoner fired at the prosecutor twice during the day. In the course of the trial it was objected that the prosecutor ought not to give evidence of two distinct felonies, but Mr. Justice Burrough held that it was admissible, on the ground that the counsel for the prisoner, by his cross-examination of the prosecutor, had endeavored to show that the gun might have gone off by accident; and the learned judge thought that the second firing was evidence to show that the first was wilful and to remove the doubt, if any existed, in the minds of the jury.¹ In *R. v. Clewes*, 4 C. & P. 221, 19 E. C. L., upon an indictment for the murder of one Hemmings, it was opened that great enmity existed between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give 50*l.* to have him shot; that the rector *was* shot by Hemmings, and that the prisoner and others who had employed him, fearing that they should be discovered, had themselves murdered Hemmings. Evidence of the malice of the prisoner against the rector was given without objection, and it was then proposed to show that Hemmings was the person by whom the rector was murdered; this was objected *to, but Littledale, J., decided that it was admissible. In *R. v. Mogg*, 4 C. & P. 364, 19 E. C. L., the prisoner was indicted [*100 for administering sulphuric acid to eight horses, with intent to kill them. Evidence that the prisoner had frequently mixed sulphuric acid with the horses' corn was objected to, but Park, J., held it was admissible, as showing whether the act was done with the intent charged in the indictment. In *R. v. Winkworth*, 4 C. & P. 444, 19 E. C. L., prisoners came with a mob to the prosecutor's house, and one of the mob went up to the prosecutor, and civilly, and as he believed with a good intention, advised him to give them something to get rid of them,

¹ *State v. McDonald*, 14 R. I. 270.

which he did. To show that this was not *bond fide* advice to the prosecutor, but in reality a mode of robbing him, it was proposed to give evidence of other demands of money made by the same mob at other houses, at different periods of the same day, when some of the prisoners were present. Parke, J., having conferred with Vaughan, B., and Alderson, B., said, "We are of opinion, that what was done by the mob, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present, may be given in evidence." He afterwards stated that the judges (it was a special commission) had communicated with Lord Tenterden, who concurred with them in his opinion. In *R. v. Geering*, 18 L. J., M. C. 215, the prisoner was indicted for the murder of her husband, in September, 1848, by administering arsenic to him. The prisoner was also charged, in three other indictments, with the murder, by similar means, of her son George, in December, 1848; of another son, James, in March, 1849; and of an attempt to murder, by similar means, another son, Benjamin, in April, 1849. On the part of the prosecution, evidence was tendered consisting of a medical *post-mortem* analysis of the intestines, heart, etc., of the husband, and two sons who were dead, and also a medical analysis of the vomit of Benjamin, showing the presence of arsenic in each case. Evidence was also tendered that all the parties lived together, and that the prisoner cooked the victuals. The evidence was objected to, but Pollock, C. B., said that the domestic history of the family during the period that the four deaths occurred was receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not. His lordship took time to consider whether he ought to reserve the point, but after consulting Alderson, B., and Talfourd J., resolved not to do so, and the prisoner was executed. The case of *R. v. Garner*, 4 F. & F. 346, is very similar. See, also, *R. v. Cotton*, 12 Cox, C. C. 400; *R. v. Roden*, 12 Cox, C. C. 630; *R. v. Heeson*, 14 Cox, C. C. 40.

In *R. v. Roebuck*, 25 L. J., M. C. 51; *Dears. & B. C. C.*, the prisoner was indicted for obtaining money from a pawnbroker by falsely pretending that a chain was silver. The chain was of a very inferior metal, and evidence was admitted apparently without objection that twenty-six chains were found on the prisoner, and that these were of similar materials. Evidence was also admitted that the defendant, a few days after the occasion in question, offered a similar chain to another pawnbroker, under similar circumstances. This was objected to, and the point, with other points, reserved. There is no trace of any discussion on this point, or any allusion to it in the judgment of the court in any of the reports; but the conviction was affirmed. The prisoner did not appear by counsel. In *R. v. Holt*, *101] *9 W. R. 74, the prisoner was tried for obtaining by false pretences a sum of money from one Hirst. It appeared that the prisoner was employed by his master to take orders for goods, but was forbidden to receive money. On the 30th of April the prisoner ob-

tained from Hirst the sum of nine shillings and sixpence in payment for goods bought by Hirst of the prisoner's master, and which sum the prisoner falsely represented that he had authority to receive; this was the offence charged in the indictment. Evidence was also tendered that within a week after the 30th of April the defendant obtained from another customer of his master the sum of eleven shillings by a similar false representation. The evidence was objected to, but received on the ground that it showed the intent of the prisoner when he committed the act charged in the indictment, and the question was reserved for the consideration of the Court of Criminal Appeal. No counsel appeared on either side, and no reasons are given for the judgment; but the conviction was quashed, Erle, J., merely saying that, upon the facts stated in the indictment, the court thought the evidence objected to inadmissible. Perhaps the ground upon which this decision proceeded was this: that the only shape in which the evidence was admissible, if at all, was for the purpose of showing that the prisoner knew he did not possess the authority which he represented himself to have; and it may have been thought that for this purpose the evidence was not relevant, because if any *bond fide* mistake existed upon this point, it would operate in one case as well as another, so that mere repetition of the act would not, as in many other cases, add anything to the evidence of guilt; though it might seem that this is rather an objection to the weight of the evidence than to its admissibility.

Where the prisoner was indicted for endeavoring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was held to have been properly admitted to show that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain, which he represented to be a gold chain, but which was not so. *R. v. Francis*, L. R. 2 C. C. 128; 43 L. J., M. C. 97; see also *post*, False Pretences.¹ It is still doubtful whether pretences made subsequently to the one charged are admissible; but it seems both on authority (*R. v. Fuidge*, 1 L. & C. 390, and *R. v. Holt*, *supra*) and on principle that they are not, on the ground that it is possible the guilty intention may not have arisen until after the acts upon which the charge is founded. (As to forged documents see *ante*, p. 95); and as to counterfeit coin see *R. v. Foster*, *ante*, p. 98.

In *R. v. Richardson*, 2 F. & F. 343, the prisoner was indicted for embezzlement; three acts of embezzlement were charged in the indictment. It appeared that the prisoner's duty was to make various payments on account of his employers, and to keep weekly accounts of the money so expended. The sums so expended were correctly entered, but in casting up the items at the end of each week the totals were made to exceed the real amount by sums varying from 1*l.* to 3*l.* The prisoner, in accounting with his master, took credit for the larger sums. For the prosecution, in order to show that this was not the result of innocent mistake on the part of the prisoner, evidence was tendered that in numerous weeks, both before and after that charged

¹ *State v. Bayne*, 88 Mo. 604.

in the indictment, similar mistakes, always in favor of the prisoner, had been made. This evidence was objected to, but Williams, J., ruled that it was admissible to counteract an obvious defence on the *102] * part of the prisoner, and he said that Pollock, C. B., entirely agreed with him on the point. So also where the prisoner had to account weekly, and in the indictment he was charged with embezzling the gross weekly amounts, evidence was admitted of the separate items making up the gross amounts, partly on the ground that the fact of having omitted to account for the separate items would go to show that the not accounting was not mere accident. *R. v. Balls*, L. R. 1 C. C. R. 328; 40 L. J., M. C. 148. See this case, *post*, Embezzlement. Where, however, on a charge of arson, there was some evidence that the prisoner had been seen going away from the burning rick, evidence to show that he and his wife had on a previous occasion been seen laughing at another fire on the same premises, and hindering a person from throwing water on it, was refused by Willes, J., on the ground apparently that the conduct sought to be proved in reference to the first case did not tend to explain what was alleged to have occurred in the second. *R. v. Harris*, 4 F. & F. 342. In *R. v. Gray*, 5 F. & F. 1102, evidence of other claims by the prisoner on other insurance companies in respect of fires was admitted by Willes, J., to show that the fire in question was not the result of accident.¹

Evidence of character of the prisoner.² The principle on which general evidence of good character on behalf of a prisoner is admitted, and the limits within which it must be confined, are settled by the case of *R. v. Rowton*, L. & C. 520, and are thus stated in the judgment of Cockburn, C. J.: "It is necessary to consider what is the meaning of evidence of character. Does it mean evidence of reputation, or evidence of disposition? I am of opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged; but no one has ever heard the question, What is the tendency and disposition of the prisoner's mind? put directly. The only way of getting at it is by giving evidence of his general character, founded on his general reputation in the neighborhood in which he lives. That, in my opinion, is the sense in which the word 'character' is to be taken when evidence of character is spoken of. . . . It is quite true that evidence of character is most cogent when it is preceded by a state-

¹ Evidence, in an indictment for arson, of threats by defendant to burn the same building are admissible. *State v. Fenlason*, 78 Me. 495.

² In civil cases evidence as to character is not admitted, unless the nature of the action involves the general character of the party, or goes directly to effect it. 1 Greenleaf's Evid., 14 edit. § 54 and notes. Proof of defendant's good character is inadmissible in a civil action for maliciously burning property. *Barton v. Thompson*, 56 Iowa, 571, s. c. 41 Am. Rep. 119. In criminal cases the character of the defendant is always relevant. When the evidence thereof is not sufficient to overcome a belief of guilt in a jury's mind, they should find a verdict of guilty. *Kilgore v. State*, 74 Ala. 1. On its use to generate doubt see next note.

ment showing that the witness has had opportunities of acquiring information upon the subject beyond what the man's neighbors in general would have; and in practice the admission of such statements is often carried beyond the letter of the law in favor of the prisoner. It is, moreover, most essential that a witness who comes forward to give a man a good character should himself have a good opinion of him, for otherwise he would be deceiving the jury; and so the strict rule is often exceeded. But when we consider what, in the strict interpretation of the law, is the limit of such evidence, in my judgment it must be restricted to the man's general reputation, and must not extend to the individual opinion of the witness. Suppose a witness is called who says that he knows nothing of the general character of the accused, but that he has abundant opportunities of forming an individual opinion as to his honesty, or the particular moral quality that may be in question in the particular case. Surely if such evidence were objected to it would be inadmissible." Erle, C. J., and Willes, J., dissented from this view, holding that evidence might be given not only of reputation but of disposition also. The result of *the doctrine laid down by the majority of the judges would [*103 appear to be, that, if a man were to obtain a high general reputation for honesty or morality by gross and systematic hypocrisy, he might call as witnesses in his favor persons equally well acquainted with the goodness of his reputation, the badness of his disposition, and the hypocrisy by which he had prevented the one *from interfering with the other*. Upon the other hand, it is to be remarked that if evidence of disposition were to be admissible, it is difficult to say where it would end; for how would it be possible to attach any weight to the evidence without ascertaining the facts upon which the opinion of the witness was grounded, and the facts, if any, tending to show that such opinion is groundless? It was decided in *R. v. Rowton*, that, if evidence of good character is given, evidence of bad character (though not of bad disposition) may be given in reply. *R. v. Rowton*, L. & C. 520.¹

¹ Good character is evidence, but not strong in favor of the accused. *Commonwealth v. Hardy*, 2 Mass. 317; *Schaller v. State*, 14 Mo. 502; *McDaniel v. State*, 8 Smed. & M. 401; *Felix v. State*, 18 Ala. 720; *Cacemi v. People*, 2 Smith, 501. [*McQueen v. State*, 82 Ind. 72. When proven it is a fact in the case tending to establish innocence to which the jury must give full weight. *People v. Ashe*, 44 Cal. 288; *People v. Donovan*, 4 N. Y. Crim. Rep. 86.] It is in a case of doubt, or to rebut the legal presumption arising from the possession of stolen articles, that evidence of good character has most weight. *State v. Ford*, 3 Strob. 517; *Epps v. State*, 19 Ga. 102. [It may be introduced to generate doubt. *Carson v. State*, 50 Ala. 134; *Williams v. State*, 52 Ala. 411; *Lee v. State*, 2 Tex. App. 338; *Kistler v. State*, 54 Ind. 400; *Coleman v. State*, 59 Miss. 484; *State v. Daley*, 53 Vt. 442. A person charged with a crime is always permitted to introduce it, and the jury should determine its weight as that of any other fact in evidence. *State v. Northrup*, 48 Ia. 583; *People v. Shepardson*, 49 Cal. 629; *Heine v. Commonwealth*, 91 Pa. St. 145; *Hanney v. Commonwealth*, 19 Weekly Notes (Pa.) 437; *People v. Clements*, 42 Hun. (N. Y.) 353; see also, *Rensen v. People*, 43 N. Y. 6; *Stover v. People*, 56 N. Y. 315; *People v. Moett*, 23 Hun. (N. Y.) 60. A refusal to permit its introduction is not cured by a subsequent admission by the testimony of other witnesses. *State v. Grate*, 68 Mo. 22. Under Arkansas Constitution the judge cannot charge upon it. *Maclin v. State*, 44 Ark. 115.] There are cases of circumstantial evidence, where the testi-

Where the prisoner gives evidence of good character, and has been previously convicted, this fact may be given in evidence in reply in

mony adduced for and against a defendant is nearly balanced, in which a good character may be very important to a man's defence; a stranger, for instance, may be placed under circumstances tending to render him suspected. He may show that, notwithstanding these suspicious circumstances, he is of perfectly good character in the neighborhood in which he resides and where he is known, and that may be sufficient to exonerate him. *Commonwealth v. Webster*, 5 Cush. 295. The prisoner's character cannot be put in issue by the State, unless he opens the door by giving testimony to it. *People v. White*, 14 Wend. 111; *Commonwealth v. Webster*, 5 Cush. 295. [*State v. Thurtell*, 29 Kan. 148; *State v. Lapage*, 57 N. H. 245; *State v. Hare*, 74 N. C. 391. Or by taking the stand and testifying in his own behalf. *Mershon v. State*, 51 Ind. 14. See *contra*, *Farley v. State*, 57 Ind. 331; *State v. Rungan*, 5 Mo. App. 501. On defendant's privilege when on the stand to refuse to criminate himself. *Brandon v. People*, 42 N. Y. 265-270; *People v. Brown*, 72 N. Y. 571. See notes to *Wharton's Crim. Ev.*, § 432, 9th ed.] But it is not a conclusion of law that from his silence the jury are to believe that he is a man of bad character. *State v. O'Neal*, 7 Ired. 251; *Ackley v. People*, 9 Barb. 609; *People v. Bodine*, 1 Dana, 282. When a defendant has, of his own accord, put his character in issue, the examination may extend to particular facts. *Commonwealth v. Robinson*, *Thacker's Crim. Cas.* 230. [*Jackson v. State*, 78 Ala. 471. *Contra*, *State v. Laxton*, 76 N. C. 216; *Commonwealth v. O'Brien*, 119 Mass. 342. Proof of conviction by record evidence is conclusive. *State v. Watson*, 65 Me. 74.] The prosecution may give evidence of bad character subsequent to the time of the commission of the offence charged. Evidence of bad reputation subsequently acquired may indeed be of little weight, but still it will have some bearing, as commonly the descent from virtue to crime is gradual. *Commonwealth v. Sackett*, 22 Pick. 394. On a trial for murder, evidence of the character of the deceased is not admissible, except where the killing is attended by circumstances to create a doubt of its character. *Quesenberry v. State*, 3 Stew. 308. In a prosecution for perjury, proof of the general bad character of the defendant for truth and veracity would be inadmissible. *Dewit v. Greenfield*, 5 O. 225; see *Commonwealth v. Hopkins*, 2 Dana, 418; *Walker v. Commonwealth*, 1 Leigh, 574. [So also proof of his good character subsequent to the commission of the offence charged. *State v. Kinley*, 43 Ia. 294.] When the character of an individual, in regard to any particular trait or as developed under peculiar circumstances is in issue, it is to be established by evidence of general reputation, and not by positive evidence of general bad conduct. *Keener v. State*, 18 Ga. 194. [*Hirschman v. People*, 101 Ill. 568.] Omission to offer testimony to a prisoner's good character does not authorize either the inference that it is bad or an argument to that effect. *State v. Upham*, 38 Me. 261. [Where the character of the defendant has not been attacked, he cannot demand from the court special instructions as to a presumption of good character. He is only entitled to the general presumption of innocence in the absence of evidence of guilt. *People v. Johnson*, 61 Cal. 142.] When a particular trait of character is in issue, evidence of character must be restricted to that trait. *State v. Dalton*, 27 Mo. 13; *People v. Josephs*, 7 Cal. 129. [*Coffee v. State*, 1 Tex. App. 548.] To authorize a witness to testify to the general character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient. *Elam v. State*, 25 Ala. 53. [*Sullivan v. State*, 66 Ala. 48; *Brownlee v. State*, 13 Tex. App. 255.] Good character in a clear case will be of no avail. *Freeland's Case*, 1 Rog. Rec. 82; *People v. Kirby*, 1 Wheel. C. C. 64; *State v. Wells*, 1 Cox, 424; *Commonwealth v. Hardy*, 2 Mass. 317. [But see *Stover v. People*, 56 N. Y. 315; *People v. Bell*, 49 Cal. 435. Good character is not entitled to controlling weight with the jury when the evidence is direct and positive. *People v. Donovan*, 4 N. Y. Crim. Rep. 86. But it may be considered by the jury. *People v. Stott*, 4 N. Y. Crim. Rep. 306.] It is in case of doubtful facts, or to rebut the legal presumption of guilt arising from the possession of stolen articles, that a good character proved in court is of most effect. *State v. Ford*, 3 Strob. 517. If on the trial of an indictment, the defendant introduces evidence of his good character prior to the alleged commission of the crime charged, it is competent to the government to prove that subsequently to that time his character had been bad. *Commonwealth v. Sackett*, 22 Pick. 394. [*Contra*, *White v. Com.*, 80 Ky. 480.] As to evidence of good character generally: see *Hopps v. People*, 31 Ill.

certain cases; see 24 & 25 Vict. c. 96, s. 116, and 24 & 25 Vict. c. 99, s. 37.

It was held upon the repealed statute, 14 & 15 Vict. c. 19, that if a prisoner's conduct elicited, on cross-examination, from the witnesses for the prosecution, that the prisoner has borne a good character, a previous conviction might be put in evidence against him, in like manner as if witnesses to his character had been called. *Per Parke, B., R. v. Gadbury*, 8 C. & P. 676, 34 E. C. L. It was "giving evidence" within the proviso in the 14 & 15 Vict. c. 19, s. 9; *R. v. Shrimpton*, 2 Den. C. C. R. 319; 24 L. J., M. C. 37.

Evidence of character of witness. Evidence is also, in all cases admissible to show that an opponent witness bears such a character and reputation that he is unworthy of belief.¹ But it is not allowed

385; *State v. Hogard*, 12 Minn. 293; *Hall v. State*, 40 Ala. 698; *Harrington v. State*, 19 O. St. 264; *People v. Stewart*, 28 Cal. 395; *People v. Gleason*, 1 Nev. 173; *State v. Turner*, 19 Ia. 144. [*People v. Bell*, 49 Cal. 485; *People v. Ashe*, 44 Cal. 288. The defendant is not entitled to an unqualified charge that five unimpeached witnesses to character are entitled to greater weight than one who swears differently. *State v. Breckenridge*, 33 La. An. 310.] The omission of the prisoner to give evidence of good character is no reason for an inference prejudicial to him. *State v. Tozier*, 49 Me. 404. [*State v. Dockstater*, 42 Ia. 436.] If the accused go into evidence of general character, the prosecution may rebut the same. *People v. Bodine*, 1 Edm. 36. [*Achey v. State*, 64 Ind. 56.] Where in defence to rape, testimony to the general good character of the accused is introduced, the State may ask, upon cross-examination, whether a certain lewd woman had not lived for some time in his family. *State v. Jerome*, 33 Conn. 265. Proof of individual acts is admissible in rebuttal of evidence of general reputation of the defendant's good character. *McCarty v. People*, 51 Ill. 231. A defendant in a criminal proceeding offered in defence proof of the character he sustained at the time of the alleged offence: held, that it was error to permit the prosecution in rebuttal to introduce evidence of his character at a subsequent period. *State v. Johnson*, 1 Winst. 151. S.

A defendant on trial for burglary cannot be asked if he was ever arrested for bigamy. He can only be impeached as any other witness. *Crapo v. People*, 15 Hun, (N. Y.) 269.

¹ *Jackson v. Osborn*, 2 Wend. 555; *Commonwealth v. Moore*, 2 Dana, 402; *Rixey v. Bayse*, 4 Leigh, 330; *Wike v. Lightner*, 11 S. & R. 198; *Swift's Evidence*, 143. When character is put in issue, evidence of particular facts may be admitted, but not where it comes in collaterally. *Commonwealth v. Moore*, 2 Dana, 402; see *Sachet v. May*, 3 Id. 80. [*State v. McIntire*, 58 Ia. 572.] To discredit a witness, it may be asked, whether he is not a man of bad moral character. *State v. Stalings*, Hayw. 300; *Hume v. Scott*, 3 Marsh. 261. [*State v. Breeden*, 58 Mo. 507; *Allis v. Leonard*, 58 N. Y. 288.] *Contra*, *Skilling v. Howell*, 5 Halst. 309. If such a question be asked, the impeaching witness may be cross-examined as to his character for veracity. *Noel v. Dickey*, 3 Bibb, 268; see *Mobely v. Hamit*, 1 Marsh. 591; *Kimmel v. Kimmel*, 3 S. & R. 336. The character for veracity of a female witness cannot be impeached by evidence of her general character for chastity. *Gilchrist v. McKee*, 4 W. 380; *Jackson v. Lewis*, 13 Johns. 504; *Commonwealth v. Moore*, 3 Pick. 194; see *Commonwealth v. Murphy*, 14 Mass. 387; *Sword v. Nester*, 3 Dana, 453; 2 Stark. Ev., new ed. 216, n. 1. [*State v. Larkin*, 11 Nev. 314.] The credit of a witness may be impeached by showing that he was intoxicated at the time the events happened to which he testifies. *Tuttle v. Russell*, 2 Day, 201; *Fleming v. State*, 5 Humph. 564; though general bad character for intemperance is inadmissible. *Brindle v. McIlvaine*, 10 S. & R. 282. [Evidence of insane delusions is not limited to the time about which he testifies. *State v. Kelly*, 57 N. H. 549.] Neighborhood is co-extensive with intercourse. It is not necessary that the character testified to should be proved to be that of the place where he resides. *Chees v. Chees*, 1 Pa. Rep. 32. [*State v. Lee*, 22 Minn. 407.] A party calling a witness as to character is confined to general questions, but the opposite party may ask particulars. *People v. De Graff*,

(with the exception of facts which go to prove that the witness is not an impartial one, see p. 104) to prove particular facts in order to dis-

1 Wheel. C. C. 205; *People v. Clarke*, Id. 295. [*People v. Reavy*, 4 N. Y. Crim. Rep. 1; *People v. Noelke*, Id. 495; *People v. Hooghkirk*, 2 Id. 204; *People v. Eckert*, 1 Id. 470; *People v. Elmore*, 3 Id. 264; *People v. Kelly*, 3 Id. 35.] A witness who is introduced to prove that another witness is unworthy of credit, should be examined as to the general character of such witness for truth and veracity. The proper inquiry is, whether the witness knows the general character of the witness attempted to be impeached, and if so, what is his general reputation for truth. On the cross-examination the inquiry should be limited to the witness's opportunity for knowing the character of such witness; for how long a time, and how generally such unfavorable reports have prevailed, and from what sources they have been derived. It is not allowable to inquire of the impeacher whether he would believe the witness attempted to be impeached on oath. *Phillips v. Kingsfield*, 19 Me. 375. [On this subject there seems to be great doubt. See *Wharton Crim. Law*, 9th ed., § 487; *Greenleaf on Evid.*, § 461; *Hamilton v. People*, 13 Am. Law Reg., N. S., 679, where it is discussed. The better opinion seems to be in favor of the English doctrine to allow the question. *Keator v. People*, 32 Mich. 484; *Hamilton v. People*, 29 Mich. 173; *Marshall v. State*, 5 Tex. App. 273. Where a reputation for veracity is established there is a presumption that it continues, even though three years have elapsed. *Lum v. State*, 11 Tex. App. 483.] A witness who is introduced for the purpose of discrediting another witness in the cause, must profess to know the general reputation of the witness sought to be discredited, before he can be heard to speak of his own opinions or of the opinions of others, as to the reliance to be placed on the testimony of the impeached witness. *State v. Parker*, 3 Ired. Law 296; *State v. O'Neal*, 4 Id. 88. [If he so professes he is not incompetent because he also says that he has not heard the witness's character canvassed. *Childs v. State*, 55 Ala. 28. Otherwise if he says only that he knows the individual and does not know his character. *Hadley v. State*, Id. 31.] When testimony is offered to impeach the general character of a witness for truth, the inquiries are not limited to the character of the witness prior to the suit, but extend to the time of the examination of the witness. *State v. Howard*, 9 N. H. 485. [In regard to the period over which testimony as to bad character may range. *Keator v. People*, 32 Mich. 844.] The proper inquiries are, what is the general reputation of the witness as to truth, and whether, from general reputation, the person testifying would believe such witness under oath as soon as men in general. Id. When a witness is sought to be impeached on the ground of his bad character, and the persons called for that purpose testify that they are acquainted with his general character, they may then be asked whether, from such general character, they would believe the witness on oath; and this, though they expressly disclaim all knowledge of the witness's character for truth and veracity. *Johnson v. People*, 3 Hill, 178. On cross-examination, inquiries as to the means of knowledge of the character of the witness, the origin of reports against him, how generally such reports have prevailed, and from whom and when he heard them, are admissible. *State v. Howard*, 9 N. H. 485. After an equal number of witnesses have been sworn on each side, in the impeaching or supporting the character of a party or witness, it is in the discretion of the presiding judge whether a greater number of witnesses shall be examined. *Bissell v. Cornell*, 24 Wend. 354; *Bunnell v. Butler*, 23 Conn. 65. [The testimony of one impeaching witness will not ordinarily be sufficient. *Wafford v. State*, 44 Tex. 439.] When a witness called to impeach the character for veracity of another witness, who had given material testimony, swore that the character of the last-mentioned witness was not on a par with that of mankind in general, he was asked, on cross-examination, what individual he had heard speak against the character of that witness, it was held that this question was a proper one. *Weeks v. Hall*, 19 Conn. 376. When a witness is impeached on the ground of bad character, evidence may be given of previous statements made by the witness, consistent with his testimony on the trial. *State v. Dove*, 10 Ired. 469; *State v. Dennis*, 32 Vt. 158. When the character of a witness is impeached, the State may introduce testimony to show that the facts to which the impeached witness testified are true. *John v. State*, 16 Ga. 200. When the credibility of a witness has been attacked from the nature of his evidence, from his situation, from bad character, from proof of previous inconsistent statements, or from imputations directed against him on cross-examination, the party introducing him may prove other consistent statements for the purpose of corroborating him. *March v. Harrell*, 1 Jones' Law, 329. [It is error for the court to instruct the jury to reject

credit him. *R. v. Watson*, 2 Stark. N. P. C. 152, 3 E. C. L.; *R. v. Laver*, 14 How. St. Tr. 285. The proper question is, "From your

the testimony of the impeached witness unless so corroborated. *Addison v. State*, 48 Ala. 478.] As a general rule, it is not competent in support of the testimony of a witness to prove that he has made declarations out of court corresponding with his testimony in court. *People v. Finnegan*, 1 Park. C. R. 147. But such testimony was allowed where the witness, on cross-examination, had been asked questions tending to discredit his testimony. *State v. DeWolf*, 8 Conn. 93; *Carter v. People*, 2 Hill, 317. So where the witness is impeached on the ground of bad character. *State v. Dove*, 10 Ired. 469. In a prosecution for rape, statements made by the prosecutrix, immediately after the transaction, may be given in evidence to corroborate her. *Laughlin v. State*, 18 O. 99; *Johnson v. State*, 17 O. 593. Testimony to support the character of a witness cannot be given in evidence unless the credibility of the witness is impeached. *Colt v. People*, 1 Park. C. R. 611. A witness called to sustain the character of an impeached witness, testifying that he has known him for a number of years, and that he knows his associates, but is not acquainted with his general character for truth and veracity, will be allowed to testify that he would believe him on his oath. *People v. Davis*, 21 Wend. 309. On the trial of a prisoner for rape, evidence of the good character of the prosecutrix is admissible by way of confirming her credibility. *Turney v. State*, 8 Smed. & Marsh. 104; *State v. De Wolf*, 8 Conn. 93. On the trial of an indictment for adultery, if one act of adultery committed by the defendant with the woman named in the indictment, is proved by the testimony of a witness whose credit is impeached, other instances of improper familiarity between the defendant and the same woman, not long before, may be given in evidence to corroborate the witness. *Commonwealth v. Merriam*, 14 Pick. 518. It is not necessary that a man's character should have been matter of discussion amongst his neighbors to enable a witness to speak of his reputation for truth. *Crabtree v. Rile*, 21 Ill. 180; *Boon v. Weathered*, 23 Tex. 675. Witnesses in his neighborhood acquainted with the character of the impeached witness, although they had never heard anything for or against his veracity, may testify that they would believe him on oath. *Taylor v. Smith*, 16 Ga. 7. A witness called to impeach the character of another witness should be asked, in the first instance, whether he has the means of knowing the general character of the witness impeached. *State v. O'Neal*, 4 Ired. 88. The questions are not confined to the character of the witness prior to the suit, but extend to the time of the examination. *State v. Howard*, 9 N. H. 485. [But see *Rawles v. State*, 56 Ind. 433; *Lawson v. State*, 32 Ark. 220; *Robinson v. State*, 16 Fla. 835; *Brown v. Luehra*, 1 Ill. App. 74; *State v. Lanier*, 79 N. C. 622.] The proper inquiries are, what is the general reputation of the witness as to truth, and whether, from such general reputation, the person giving testimony would believe such witness under oath. *Id.* The general character of a witness, at his place of business, cannot be shown by evidence of what rumor said of it before he came to that place. *Campbell v. State*, 23 Ala. 44.

As to the proper mode of inquiry in impeaching the character of a witness: *State v. Randolph*, 24 Conn. 363; *Hooper v. Moore*, 3 Jones' Law, 428; *Wilson v. State*, 3 Wis. 798; *Stokes v. State*, 18 Ga. 17; *Holmes v. Stateler*, 17 Ill. 453; *Teece v. Huntingdon*, 23 How. 2; *Pierce v. Newton*, 13 Gray, 528; *Mash v. State*, 36 Miss. 77; *Macdonald v. Garrison*, 2 Hilt. 510; *Boon v. Weathered*, 23 Tex. 675; *Crabtree v. Rile*, 21 Ill. 180; *Gilliam v. State*, 1 Head, 38; *Henderson v. Hayne*, 2 Metc. (Ky.) 342; *Eason v. Chapman*, 21 Ill. 33; *State v. Sater*, 8 Clarke, 420; *Boswell v. Blackman*, 12 Ga. 592; *Kelley v. Proctor*, 41 N. H. 139; *Long v. Morrison*, 14 Ind. 595; *Cook v. Hunt*, 24 Ill. 535; *Wright v. Page*, 36 Barb. 438; *Wilson v. State*, 16 Ind. 392; *Crabtree v. Hagenbaugh*, 25 Ill. 233; *Shaw v. Emery*, 42 Me. 59; *Ward v. State*, 28 Ala. 53; *Thurman v. Virgin*, 18 B. Mon. 785; *Craig v. Ohio*, 5 O. St. 605; *Ruche v. Beatty*, 3 Ind. 70; *Webber v. Hanke*, 4 Mich. 198; *Willard v. Goodenough*, 30 Vt. 393; *Pleasant v. State*, 15 Ark. 624. [Majors v. State, 29 Ark. 112; on cross-examination a witness can only be asked as to convictions that effect credits; *State v. Huff*, 11 Nev. 17; *Brown v. People*, 8 Hun, (N. Y.) 562; *People v. Chin*, 51 Cal. 597.]

A party cannot give evidence to confirm the good character of a witness, unless his general character had been previously impugned by the other party. *Braddee v. Brownfield*, 9 W. 124; *Werte v. May*, 21 Pa. St. 274. When, on the trial of an indictment, a material witness for the prisoner, on his cross-examination by the counsel for the prosecution, admitted that he had been complained of and bound over

knowledge of his general character, would you believe him on his oath? *Mawson v. Hartsink*, 4 Esp. 102, *per* Lord Ellenborough, C. J. See also, *R. v. Brown*, L. R. 1 C. C. R. 70; 36 L. J., M. C. 59. There is, however, another exception to the above rule, for by the 28 Vict. c. 18, s. 8, a witness may be questioned as to whether he has

upon a charge of passing counterfeit money: *held*, that in answer the prisoner was entitled to give evidence of the witness's good character for truth. *Carter v. People*, 2 Hill, 317. [See *State v. Ezell*, 41 Tex. 35.] An admission by a witness that he had been prosecuted, but not tried for perjury, does not authorize the party calling him to give evidence of his general good character. *People v. Gay*, 1 Park. C. R. 308. On the trial of an indictment for rape alleged to have been committed on board a vessel, the prisoner attempted to discredit the testimony of the complainant: 1. By showing, on cross-examination, that her story was improbable in itself. 2. By disproving some of the facts to which she testified. 3. By evidence that her conduct, while on board the vessel and afterwards, was inconsistent with the idea of the offence having been committed; and 4. By calling witnesses to show that the account which she had given of the matter out of court did not correspond with the statements under oath: *held*, evidence of her good character inadmissible in reply. *People v. Hulsa*, 3 Hill, 309. Proof of contradictory statements will not warrant admission of character. *Frost v. McCargar*, 29 Barb. 617; *Chapman v. Cooley*, 12 Rich. Law, 654; *Vance v. Vance*, 2 Metc. (Ky.) 581; *Newton v. Jackson*, 23 Ala. 335. *Contra*, *Burrell v. State*, 18 Tex. 713; *Stamper v. Griffin*, 12 Ga. 450. The testimony of a witness, upon cross-examination, that he had been tried for a crime in another State, and acquitted, does not authorize the party calling him to introduce evidence of his general character. *Harrington v. Lincoln*, 4 Gray, 563. Nor will evidence tending to contradict him. *Haywood v. Reed*, Id. 574. [But evidence that he has been guilty of an infamous crime will. *Webb v. State*, 29 Ohio St. 351.] An attempt to impeach a witness by asking another witness what was his character for truth, warrants the introduction of evidence to support his character, though the answer to the question was that his character was good. *Commonwealth v. Ingraham*, 7 Gray, 46. When a witness, on cross-examination, admitted that he had been bound over for perjury: *held*, that it did not let in evidence to sustain his general character. *People v. Gay*, 3 Seld. 378.

As to evidence to impeach the character of a witness generally: See *Taylor v. Commonwealth*, 3 Busk, 508; *Taylor v. Clendening*, 4 Kan. 524; *Boles v. State*, 46 Ala. 204; *Ford v. Jones*, 62 Barb. 484; *People v. Yslas*, 27 Cal. 630; *Rogers v. Lewis*, 19 Ind. 405. [When the defendant is a witness, his credibility may be impeached by evidence of his character, but this cannot be put in to show his guilt, unless he first introduces it. *Adams v. People*, 9 Hun, (N. Y.) 89. That the verdict is supported by the testimony of a single witness concerning whose credit and good character, contradictory evidence was introduced is not ground to set it aside. *Anderson v. State*, 6 Lea, (Tenn.) 602.] An impeaching witness may be impeached by proof of general character, or in cross-examination; and when that is done, the impeaching witness may be supported by proof of general character. *State v. Cherry*, 63 N. C. 493; *State v. Moon*, 25 Ia. 128; *State v. Brunt*, 14 Id. 180. [To show that the witness has been convicted of a felony is such impeachment of his character as to entitle the party calling him to show his good character in rebuttal; *People v. Amanacus*, 50 Cal. 233; *People v. Ah Fat*, 48 Cal. 61.] It is not essential to the successful impeachment of a witness's character for truth, that the impeaching witness should state that he would not believe him under oath. *People v. Tyler*, 35 Cal. 553. It is improper to ask a witness on cross-examination, if he was not successfully impeached as a witness on the trial of another case. *State v. Wooderd*, 20 Ia. 541. [And whether he had during the same term of court pleaded guilty to a criminal offence. The record is the best evidence. *Johnson v. State*, 48 Ga. 116. But see *Lights v. State*, 21 Tex. App. 308.] If a question put to a witness is an imputation on his character, and is calculated to degrade him before the jury, evidence as to his character is admissible. *State v. Cherry*, 63 N. C. 493. They may discredit a witness though no evidence has been given to impeach his character. *George v. State*, 39 Minn. 570. Evidence to corroborate a witness may be excluded if his testimony has not been attacked in any manner. *State v. Rorabacker*, 19 Ia. 154. 8.

Under the Oregon code a witness may be discredited by asking him if he has been convicted of a crime. *State v. Bacon*, 8 Crim. Law Mag. 81.

been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction. (As to the method of proving the conviction, see the same section, *post*, tit. Documentary Evidence.) But the person who calls a witness is always supposed to put him forward as a person worthy of belief; he cannot, therefore, if his testimony should turn out unfavorably, or even if the witness should assume a position of hostility, give general evidence to discredit him. Bull. N. P. 297. How far a party may contradict his own witness, we shall see presently, p. 105. And if the character of any witness for credibility be impeached either by direct evidence or upon cross-examination, his testimony may be supported by general evidence that his character is such that he is worthy of credit. Evidence cannot be given of a prisoner's bad character for the purpose of showing that a policeman *had good cause to suspect him of a crime, and was therefore acting in the execution of his duty when he arrested him under [*104 24 & 25 Vict. c. 96, s. 104, *post*, tit. Apprehension of Offenders, R. v. Tuberfield, L. & C. 495. There is a provision in the Prevention of Crimes Act, by which, in proving the intent to commit a felony by a rogue and vagabond under the 5 Geo. 4, c. 83, amended by 36 & 37 Vict. c. 38, it is not necessary to show any particular acts; but the intent may be gathered from the circumstances and the known character of the prisoner. See 34 & 35 Vict. c. 112, s. 15.¹

¹ *Lawrence v. Barker*, 5 Wend. 301; *Jackson v. Varick*, 7 Cow. 238; *DeLisle v. Priestman*, 1 Browne, 176; *Cowder v. Reynolds*, 12 S. & R. 281; *Queen v. State*, 5 H. & J. 232; *Perry v. Massey*, 1 Bail. 32; *Winslow v. Mosely*, 2 Stew. 137; *Webster v. Lee*, 5 Mass. 334; *Steinback v. Columbian Ins. Co.*, 2 Caine, 129; *Stockton v. Derrutt*, 7 W. 39. [It is error to reject evidence offered by defendant of the acts and words of certain witnesses for the purpose of contradicting them. *Mixon v. State*, 35 Miss. 525.] But an attesting witness is a witness of the law, and may be discredited by any one who examines him. *Crowell v. Kirk*, 3 Dev. 355; see *Jackson v. Varick*, 7 Cow. 238. *Contra*, *Whitaker v. Salisbury*, 15 Pick. 534; *Patterson v. Schenck*, 3 Gr. 434; *Booker v. Bowles*, 2 Blackf. 90. [A defendant examined for his co-defendant is liable to impeachment just as if he were not upon trial himself. *State v. Hardin*, 46 Ia. 623.] It has been held in North Carolina, that the Attorney-General may produce evidence to discredit a witness for the Commonwealth. *State v. Morris*, 1 Hayw. 438. But see *Brown's Case*, 2 Rog. Rec. 151, and *Queen v. State*, 5 H. & J. 232. A witness subpoenaed by the plaintiff, but not examined by him, but by defendant, may be impeached by the plaintiff. *Beebe v. Sinker*, 2 Root, 160; *Commonwealth v. Boyer*, 2 Wheel. C. C. 151. Although a party calling a witness shall not be allowed to impeach his general character, yet he may show that he has told a different story at another time. *Cowder v. Reynolds*, 12 S. & R. 281. [Especially where he shows that he was entrapped to introduce the witness by such different story. *McDaniel v. State*, 53 Ga. 253.] But a party cannot, after examining a witness, give in evidence his former testimony and declarations ostensibly to discredit him, but, in truth, to operate as independent evidence. *Smith v. Price*, 8 W. 447. Where a witness gives evidence against the party calling him, and is an unwilling witness, or in the interest of the opposite party, he may be asked by the party calling him, at the discretion of the court, whether he has not, on a former occasion, given different testimony as to a particular fact. *Bank Northern Liberties v. Davis*, 6 W. & S. 285. [*Brubaker v. Taylor*, 76 Pa. St. 83. But a mere failure on the part of a witness to testify as expected by the party calling him will not enable said party to show otherwise alleged statements made by the witness to others tending to prove the case. *People v. Jacobs*, 49 Cal. 384.] A party may prove the fact to be different from what one of his own witnesses has stated it to be. That is not discrediting his witness. *Spencer v. White*,

These are the only cases in which evidence of character can be given in chief; as to the cross-examination of witnesses upon their character, see *infra*, and tit. Practice.

Evidence used for the purpose of contradiction only. Any fact material to the issue which has been proved by one side, may be contradicted by the other. The only fact material to the issue, with reference to which there is any peculiarity in this respect is the credibility of a witness. As has already been said, that is a point upon which a witness may be impeached by direct evidence, showing *generally* his want of credibility; and, as we shall hereafter see, a witness may also be cross-examined as to particular facts which go to discredit him. But whether it be to contradict the direct evidence which impeaches the witness's credit, or to contradict the suggestions thrown out by the line of cross-examination, it is clear that, in order to reinstate the witness, no evidence can be used but *general* evidence that he is worthy of credit, in the same way as he may be impeached by *general* evidence that he is not so.¹

In a precisely similar manner if a witness, on cross-examination, refuses to admit facts which damage his credit, he cannot be contradicted on these points, if they are not otherwise material to the issue. *Spenceley v. De Willott*, 7 East, 108; *R. v. Yewin*, 2 Campb. 638. And after much discussion, the same rule now holds with respect to the evidence of the woman in charges of rape; see *post*, Rape. Except in the case of proof of previous conviction under the 28 Vict. c. 18, s. 8, see *supra*.

The two last-mentioned rules are founded on the necessity which

¹ 1 Ired. 236. [*State v. Simon*, 37 La. An. 569.] The rule that a party cannot discredit his own witness by proving that he had made contradictory statements at other times, does not apply to those cases where the party is under the necessity of calling the subscribing witness to an instrument. *Dennett v. Dow*, 17 Me. 19. [Nor to those cases in which the witness is called also by the other side and he desires to contradict the testimony given by him for that other side. *Jones v. People*, 2 Col. T. 351.] A party cannot discredit his own witness or show his incompetency, though he may call other witnesses to contradict him as to a fact material to the issue, in order to show how the fact really is. *Franklin Bank v. Steam Nav. Co.*, 11 G. & J. 28. [*Coulter v. Am. Express Co.*, 56 N. Y. 585.] A party cannot be allowed to insist that his own witness is not to be believed. He has the right, if surprised by his testimony, to show by other witnesses that the facts testified to are otherwise. But he cannot impeach him directly or indirectly. *Hunt v. Fish*, 4 Barb. 324; *Burkhalter v. Edwards*, 16 Ga. 593. A party cannot impeach his own witness by proof of statements contradictory to his evidence in court, although he may prove a fact to be otherwise than his own witness states it. *Commonwealth v. Starkweather*, 10 Cush. 59; *Brolley v. Lapham*, 13 Gray, 294; *Champ v. Commonwealth*, 2 Metc. (Ky.) 17. Party cannot discredit his own witness by asking him if he had not made contradictory statements. *Sanchez v. People*, 22 N. Y. 147. The State cannot impeach her own witness. *Quinn v. State*, 14 Ind. 589. Proof that a witness had made material false statements, which are relied on as proving him unworthy of credit, will not authorize the party calling him to introduce evidence of his general reputation for truth. *Brown v. Mooers*, 6 Gray, 451. S.

Proof that a witness called by defendant has testified falsely is not to be regarded as corroborative of defendant's guilt. *State v. Brown*, 76 N. C. 222.

¹ A witness cannot be impeached by proof of particular acts. *Barbour v. Commonwealth*, 80 Va. 287.

exists of putting some limit on the extent to which an inquiry may be carried, without which proceedings might be spun out to an interminable length. See, however, *Reg. v. Whelan*, cited *infra*.

Evidence that a witness is not impartial. What has been just said as to not giving evidence of particular facts merely for the purpose of impeaching the credit of a witness, does not apply where the fact sought to be proved goes to show that the witness does not stand indifferent between the contending parties. Best Ev. 723.¹ Thus in *R. v. Yewin*, *supra*, the witness was asked whether he had not said that he would be avenged upon his master, and would soon fix him in gaol. This he denied, but Lawrence, J., allowed him to be contradicted. So also it may be proved that a witness has been bribed to give his evidence, *R. v. Langhorn*, 7 How. St. Tr. 446, or that he has endeavored to suborn others, *R. v. Lord Stafford*, Id. 400, both of which cases were recognized in *Att.-Gen. v. Hitchcock*, 1 Ex. R. 91. And the same law was assumed by the judges, in answering a question put to him by the House of Lords, in the Queen's case, 2 Brod. & B. 311, 6 E. C. L. But the question must be one which goes directly to prove, *and not merely to suggest, improper conduct or partiality of the witness. Thus, in the case the *Att.-Gen. v. Hitchcock*, [*105 *supra*, a revenue case, the question put to the witness was whether he had not said that the officers of the Crown had offered him a bribe to give his testimony, which he denied; and on this the Court of Exchequer held that he could not be contradicted. Upon a trial for murder in Ireland a witness identified the prisoner and was cross-examined as to whether he had not stated that the prisoner was not the man. This he denied. The prisoner called A. and B. to prove the witness had so said. The prosecution were allowed to call C. and D. to contradict A. and B., and support the witness. In the same case for the defence E. stated that the witness had told him that he did not recognize the prisoner, and on cross-examination he said he had reported this fact to his superior officers, but the prosecution were not allowed to call the superior officers to say this was untrue. May, C. J., seemed to regard the question of admissibility as one for the discretion of the judge; but the proper test is whether the evidence is material or irrelevant. *Reg. v. Whelan*, 14 Cox, C. C. Ir. 595.

An important rule was laid down in the Queen's case, *supra*, with reference to this species of evidence. It was there decided, that if it be intended to offer evidence of statements made by a witness touching the matter in question, which show that he is not a credible witness, either from improper conduct or partiality, that the witness must be first asked in cross-examination, whether or no he made the statements imputed to him, in order that he may, if he chose, admit and attempt

¹ A witness cannot be impeached by showing that a third person, prejudiced against the accused, threatened to procure the witness to testify against him. *Benton v. State*, 30 Ark. 323. The bias of a witness may be shown but not the causes of such bias. *Chelton v. State*, 45 Md. 564; *People v. Penhollow*, 42 Hun, (N. Y.) 103. On the questions proper to show ill feeling of witness to accused. *Hinds v. State*, 55 Ala. 145; *Carlson v. State*, 5 Tex. App. 194.

to explain them.¹ The principles and reasoning of this decision seem to apply to acts as well as statements.

Evidence to contradict the party's own witness. It has already been said, that a party who calls a witness cannot bring general evidence to discredit him; but if a witness state material facts which make against the party who calls him, other witnesses may be called to prove the facts were otherwise. A great doubt used to exist whether it is competent to a party to prove that a witness called by him, who has given evidence against him, has made at other times a statement contrary to that made by him at the trial; but now the 28 Vict. c. 18, s. 3, provides that a party producing a witness may, "in case the witness shall, in the opinion of the judge, prove *adverse*, contradict him by other evidence, or by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony;" but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked, whether or not he has made such statement. So in a case of rape where the girl in a cross-examination gave particulars of the assault inconsistent with the instructions of counsel for the prosecution; Day, J. (after consulting Cave, J.), came to the conclusion that the witness was adverse, and allowed her to be cross-examined in re-examination, and witnesses to be called to contradict her. *Reg. v. Little*, 14 Cox, C. C. 319. See *post*, Examination of Witnesses.²

Evidence of former statements to confirm a party's own witness. The only occasion on which, if at all, a party can confirm his own witness by proof of former statements made by him according with that made at the trial, is when the witness's credibility has been *106] attacked, *either on cross-examination or by independent evidence.³ Whether it is admissible in this case has been much con-

¹ *Booker v. State*, 4 Tex. App. 564. A witness cannot be impeached by anything that was said out of his presence. *Clarke v. State*, 78 Ala. 474. He may be impeached by proof of statements made by him inconsistent with what he testifies in court. *People v. French*, 8 Crim. Law, Mag. 45.

² Generally where the accused elicits adverse testimony he must take the consequences. He cannot have it excluded, even where it has already been so when introduced by the prosecution. *Speights v. State*, 1 Tex. App. 551.

³ *Ware v. Ware*, 8 Greenl. 42; *Atwood v. Felton*, 7 Conn. 66; *State v. Alexander*, 1 Rep. Const. Ct. 171. Cross-examination as to irrelevant matter will not bring it into issue. *Griffith v. Eshleman*, 4 W. 51; *Page v. Hemans*, 14 Me. 478; *Goodhand v. Benton*, 6 G. & J. 481; *Williams v. State*, Wright (O.), 42; *Smith v. Drew*, 3 Whart. 154; *Norton v. Valentine*, 15 Me. 36; see *People v. Byrd*, 1 Wheel. C. C. 242. [*Coleman v. People*, 55 N. Y. 81. But where on a trial for murder, the cross-examination of a State witness elicited the fact that the defendant once committed forgery, it is no ground for reversal that the State was afterwards allowed to prove that fact by another witness. *State v. Kring*, 74 Mo. 612.] A witness may be cross-examined as to any collateral fact which has any tendency to test either his accuracy or veracity, but the party must be bound by the answers of the witness, and cannot adduce proof in contradiction of such answers. And if, in the course of the trial, testimony is

troverted. In some cases such evidence has been admitted. *Lutterell v. Reynell*, 1 Mod. 282; *R. v. Friend*, 13 How. St. Tr. 32. See also *R. v.*

given without objection tending to contradict such answers, it is not even then competent for the party offering the first witness to give independent proof tending to corroborate the witness as to these collateral matters. *Stevens v. Beach*, 2 Vt. 585. [*State v. Patterson*, 74 N. C. 157; *People v. Morrigan*, 29 Mich. 5; *State v. Benner*, 64 Me. 267. Matters unconnected with the cause or the parties are collateral and subject to this rule. *Hester v. Com.*, 85 Pa. St. 139. So also questions as to religious belief. *Clinton v. State*, 33 Ohio St. 27.] In respect to collateral matters drawn out by cross-examination, the answers of the witness are in general to be regarded as conclusive. The exception to this rule is, when the cross-examination is as to matters which, though collateral, tend to show the temper, disposition, or conduct of the witness towards the cause or the parties. The answer of the witness as to these matters may be contradicted. *State v. Patterson*, 2 Ired. 346. [*Beardsley v. Wildman*, 41 Conn. 515; *State v. Roberts*, 81 N. C. 605; *Scott v. State*, 64 Ind. 400.] A witness cannot be cross-examined on immaterial matters in order to contradict him and impeach his credibility. *Rosenbaum v. State*, 33 Ala. 354; *Blakey v. Blakey*, Id. 611; *Seavy v. Dearborn*, 19 N. H. 351; *Cornelius v. Commonwealth*, 15 B. Mon. 539; *State v. Thibau*, 30 Vt. 100; *Hersom v. Henderson*, 3 Fost. 498; *Morgan v. Frees*, 15 Barb. 352; *Mitchum v. State*, 11 Ga. 615; *Orten v. Jewitt*, 23 Ala. 662; *Powers v. Leach*, 26 Vt. 270; *Winter v. Meeker*, 25 Conn. 456; *Cokely v. State*, 4 Ia. 477; *Scale v. Chambliss*, 35 Ala. 19; *People v. McGinnis*, 1 Park. C. R. 387. [*Crittenden v. Com.*, 82 Ky. 164; *People v. Budensieck*, 4 N. Y. Crim. R. 230. But where a witness has testified in chief that he had no ill feeling against the accused, it is error to exclude on cross-examination his declarations showing a different state of feeling. *McFarlin v. State*, 41 Tex. 23. The testimony of married women in a criminal case cannot be impeached by proof of a conspiracy on the part of their husbands to extort money from defendant. *People v. Parton*, 49 Cal. 632.] It is not collateral but relevant to the main issue to inquire into the motives of a witness, and a party who examines him in regard to them is not bound by his answers, but may contradict him. *People v. Austin*, 1 Park. C. C. 154; *Newcomb v. State*, 37 Miss. 383; *Bersch v. State*, 13 Ind. 434; *Collins v. Stephenson*, 5 Gray, 438. A witness may be cross-examined as to prior conversations with third persons which tend to show ill will on his part towards the party against whom he is called, both for the purpose of affecting his credibility and also of laying the foundation for the contradiction of his testimony. *Powell v. Martin*, 10 Ia. 568. A witness must be inquired of as to time, place, and person, before he can be impeached by calling witnesses to contradict him. *Wright v. Hicks*, 15 Ga. 160. [*People v. Devine*, 14 Cal. 452. So a paper must be read to him before it can be used to contradict him. *State v. Matthews*, 83 Mo. 121.] Before a witness can be contradicted by his own statements made out of court his attention must be specially called to them; it is not enough to ask a general question without naming the person. *State v. Marler*, 2 Ala. 43; *Brown v. Kimball*, 25 Wend. 259; *Joy v. State*, 14 Ind. 139; *Cook v. Hunt*, 24 Ill. 535; *Baker v. Joseph*, 16 Cal. 173; *Mendenhall v. Banks*, 16 Ind. 284; *Judy v. Johnson*, Id. 371; *Morrison v. Myers*, 11 Ia. 538; *Evertson v. Carpenter*, 17 Wend. 419; *Stewart v. Chadwick*, 8 Clarke, 463; *Vatton v. National*, 6 Smith, 32; *State v. Davis*, 29 Mo. 391; *Ketchingman v. State*, 6 Wis. 426; *Sutton v. Reagan et al.*, 5 Blackf. 217; *Unis v. Charlton's Adm.*, 12 Gratt. 484; *Atkins v. State*, 16 Ark. 568; *Vatton v. National*, 22 Barb. 9; *Budlong v. Van Nostrand*, 24 Barb. 25; *Hooper v. Moore*, 3 Jones' Law, 428; *Stacey v. Graham*, 4 Kern. 492; *Bryan v. Walter*, 14 Ga. 485; *Smith v. People*, 2 Mich. 415; *Conrad v. Griffey*, 16 How. 38; *People v. Austin*, 1 Park. C. R. 154; *Barb v. Steam Navigation Co.*, 11 G. & J. 28. [*State v. McLaughlin*, 44 Ia. 82; *Newton v. State*, 21 Fla. 53.] *Contra*, *Gould v. Norfolk Lead Co.*, 9 Cush. 338; *Commonwealth v. Hawkins*, 3 Gray, 463; *Howland v. Conway*, 1 Abb. Adm. 281; *Cook v. Brown*, 3 N. H. 460; *Hedge v. Clapp*, 22 Conn. 262. [But it is not necessary to put to the witness the precise question which it is intended to put to the impeaching witness. *Hotchkiss v. Germania Ins. Co.* 5 Hun, (N. Y.) 90.] A witness may, in the discretion of the judge, be recalled and examined in a leading manner to contradict a witness introduced to attack his credit. *Thomason v. State*, 22 Ga. 499. [*State v. Jones*, 64 Mo. 391.] When there is a dispute as to localities, a diagram which is drawn in accordance with the testimony of the witness, may be given to the jury without having been first exhibited to the witness whose testimony it contradicts. *Bishop v. State*, 9 Ga. 121. [So an affidavit which the witness says he has read and

Harrison, 12 How. St. Tr. 861. So it is laid down by Gilbert, C. B., that though hearsay be not allowed as direct evidence, yet it may be in

remembers, may be read to show that it contains statements contrary to those made by defendant in trial. *Honstine v. O'Donnel*, 5 Hun. (N. Y.) 472.] A witness may be impeached by showing that he has made contradictory statements, although his denial of such statements is not positive, but merely that he does not remember them. *Nute v. Nute*, 41 N. H. 60; *Ray v. Bell*, 24 Ill. 444. [*Payne v. State*, 60 Ala. 80.] *Contra*, *Mendenhall v. Bank*, 16 Ind. 284. [But such statements are not admissible for the purpose of contradicting the fact to which he testifies. For such a purpose they are hearsay. *Loving v. Commonwealth*, 80 Ky. 507; *State v. Benner*, 64 Me. 267. The statement must be on matters relevant to the issue. *Henderson v. State*, 1 Tex. App. 432.] The examination of a witness before the committing magistrate, if his presence can be obtained, is not admissible, but when he has been examined it may be used to contradict him. *State v. McLeod*, 1 Hawks, 344; *Oliver v. State*, 5 How. 14. On a trial for murder, the deposition of a witness given before the inquest, taken down at the time by the coroner, and read to and signed by the witness, may be introduced to contradict him. *Wormeley v. Commonwealth*, 10 Gratt. 658. [But not the evidence before the grand jury or upon preliminary examination. *State v. Hayden*, 45 Ia. 11. *Contra*, *Little v. Commonwealth*, 25 Grattan, 94; *State v. Tickel*, 13 Nev. 502.] Where the credit of a witness is attacked by proving former statements contradictory to his statements in court, it is competent in his support to show statements made at other times and places consistent therewith. *Dorsett v. Miller*, 3 Sneed, 72. [*State v. Laxton*, 78 N. C. 564; *State v. Petty*, 21 Kan. 54.] *Contra*, *Smith v. Stickney*, 17 Barb. 489; *People v. Finnegan*, 1 Park. C. R. 147; *Lamb v. Stewart*, 2 O. 230; *Stahle v. Spohn*, 8 S. & R. 317. [Even when made subsequent to the impeaching statement. *Brookbank v. State*, 55 Ind. 169.] A witness may object to answer as to what he testified on a former trial. *Mitchell v. Hinman*, 8 Wend. 667. That the contradictory statements of a witness cannot be met by proof of others agreeing with his testimony, see *Ware v. Ware*, 8 Greenl. 82; *Jackson v. Etz*, 5 Cow. 314; *Munson v. Hastings*, 12 Vt. 346. The contrary doctrine is held in *Johnson v. Patterson*, 2 Hawks, 183; *Cook v. Curtis*, 6 H. & J. 93; *Henderson v. Jones*, 10 S. & R. 322; *Coffin v. Anderson*, 4 Blackf. 395. A witness whose credit has been impeached by evidence of contradictory statements cannot be sustained by proof of good character. *Russell v. Coffin*, 8 Pick. 143; *Rogers v. Moore*, 10 Conn. 13. [*Webb v. State*, 29 Ohio St. 351.] *Contra*, *Richmond v. Richmond*, 10 Yerg. 343. [As to the period over which the testimony as to good character may range, see *Stratton v. State*, 45 Ind. 468. Where evidence of good character has been admitted to sustain an impeached witness the State may also show the good character of the impeaching witness. *Davis v. State*, 38 Md. 15.] Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is as a general and almost universal rule, inadmissible. [*Haynes v. Commonwealth*, 28 Grattan (Va.), 942.] It seems, however, that to this rule there are exceptions, and that under special circumstances such proof will be received; as when the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction, given by the witness, is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation arising from a charge of circumstances could have been foreseen. *Robb v. Hackley*, 23 Wend. 50. [*People v. Doyle*, 48 Cal. 85; *Hotchkiss v. Germania*, 5 Hun. (N. Y.) 90. So also where the fact that he did so testify is a part of the *res gestæ*. *People v. Morrigan*, 29 Mich. 5. Or for the purpose of indemnification. *Commonwealth v. Piper*, 120 Mass. 185.] When no design to misrepresent is charged against a witness in consequence of his relation to the party or to the cause, evidence of similar statements made by him on former occasions is not admissible to support the truth of what he may testify. *State v. Thomas*, 3 Strobbart, 269. When the credit of a witness has been impeached by proof that in a certain conversation he had made statements inconsistent with the truth of his testimony, he may on re-examination be asked and may state what that conversation was to which the impeaching witness referred. *State v. Winkley*, 14 N. H. 480.

Witness may be contradicted by showing that he had stated otherwise, his attention being first called to it. *Patton v. People*, 18 Mich. 314; *State v. Hoyt*, 13 Minn. 132; *State v. Collins*, 32 Ia. 36. [But he cannot be asked whether he has not previously

corroboration of a witness's testimony, to show that he affirmed the same thing before on other occasions, and that the witness is still consistent with himself; for such evidence is only in support of the witness that gives in his testimony upon oath. Gilb. Ev. 135, 6th ed. See also Hawk. P. C., b. 2, c. 36, s. 48. These writers were followed by Mr. Justice Buller in his treatise on the law of *nisi prius* at p. 294, citing the case of *Lutterell v. Reynell*, 1 Mod. 283; but in *R. v. Parker*, 3 Dougl. 242, 26 E. C. L., the same learned judge said that the case of *Lutterell v. Reynell*, and the passage in *Hawkins* was not now law. The case of *R. v. Parker* was a prosecution for perjury tried before Eyre, B. For the prosecution the depositions of a deceased person were given in evidence, and upon the cross-examination of one of the prosecutor's witnesses, it was proposed to inquire into certain declarations of the deceased person, not on oath, for the purpose of corroborating some facts in the deposition material to the prisoner. Eyre, B., rejected the evidence of these declarations, and the Court of King's Bench, on a motion for a new trial, held the rejection proper. This case was referred to by Lord Redesdale in the *Berkeley Peerage* case, where his lordship gave his opinion in conformity thereto. Lord Eldon also concurred in that opinion. In conformity with these latter decisions the rule is laid down by Mr. Phillpotts, with this exception, that where the counsel on the other side impute a design to misrepresent from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist. 2 Phill. Ev. 523, 10th ed.

said that in his opinion defendant was not guilty after testifying to criminalizing facts. *Commonwealth v. Moony*, 110 Mass. 99; *State v. Maxwell*, 42 Ia. 208.]

In an indictment for libel, where the party libelled is offered as a witness for the prosecution, it is competent to discredit his testimony by proof of contrary statements made out of court, his attention having been first called thereto. *State v. Bertman*, 15 La. An. 116.

Evidence to confirm a witness by proving that he has given the same account out of court is not admissible, although it has been proved in order to contradict him that he has given a different account. *United States v. Holmes*, 1 Cliff. C. C. 98; *State v. Vincent*, 24 Ia. 570. [*State v. Parish*, 79 N. C. 610.]

Witness can only be contradicted in material point. *Geary v. People*, 22 Mich. 220; *Powers v. State*, 44 Ga. 209; *Gibbs v. Linaberry*, 22 Mich. 479. [*Davis v. Keyes*, 112 Mass. 436.]

The maxim *verum in uno, falsum in omnibus*, does not prevail in courts of law, the fact that a witness has sworn falsely as to one matter going to the credibility, and not to the competency of his testimony as to other matters. *State v. Smith*, 8 Jones' (L.), 132; *Stoffie v. State*, 15 O. St. 47; *Meixsell v. Williamson*, 35 Ill. 529; *People v. Strong*, 30 Cal. 151. S. *Pierce v. State*, 53 Ga. 365; *State v. Elkins*, 63 Mo. 159.

There is no rule of law that the entire testimony of such a witness must be disregarded. *People v. Reavy*, 4 N. Y. Crim. Rep. 1. But the jury have a right to do so if they please. *People v. Buddensieck*, 4 Id. 230; *People v. Stott*, 4 Id. 306. On the credibility of the witnesses, generally, and that it is for the jury, see *Jones v. State*, 48 Ga. 163; *Wallace v. State*, 28 Ark. 531; *Kinner v. State*, 45 Ind. 175; *Pridgen v. Walker*, 40 Tex. 135; *Bowers v. People*, 74 Ill. 418; *Jones v. State*, 77 N. C. 520; *McLain v. Commonwealth*, 99 Pa. St. 86. Testimony which is unreasonable may be believed by the jury. Its weight is for them. *Ross v. State*, 74 Ala. 532.

*107]

*ATTENDANCE OF WITNESSES.

ATTENDANCE, REMUNERATION, AND PROTECTION OF WITNESSES.

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Mode of compelling the attendance of witnesses—by recognizance. There are two modes of compelling the attendance of witnesses; first, by recognizance; second, by subpoena.

The power to bind witnesses by recognizance to appear and give evidence was originally given by the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10. It was further extended by the 7 Geo. 4, c. 64, which repealed the prior statutes; and is now regulated by the 11 & 12 Vict. c. 42, s. 20, by which power is given in all cases, whether of felony or misdemeanor, to bind by recognizance the prosecutor and witnesses to appear and give evidence at the next court of oyer and terminer and general gaol delivery, or the next court of quarter sessions, as the case may be. The same power is exercised by coroners under the 7 Geo. 4, c. 64, s. 4, in cases of murder and manslaughter. So, also, witnesses for the defence may now be bound over to appear. See 30 & 31 Vict. c. 35, s. 3, incorporated with the 11 & 12 Vict. c. 42; see section 4, *post*, Appendix of Statutes.

When a trial is postponed, the presiding judge, exercising the ordinary functions of a justice of the peace, usually binds over the prosecutor and witnesses to appear and give evidence at the next assizes or the next quarter sessions, as the case may be.

If a witness on his examination before a magistrate refuses to be bound over he may, by the express provisions of the 11 & 12 Vict. c. 42, s. 20, be committed. It seems doubtful whether, in any case, a witness can be compelled to find sureties for his or her appearance. *Per* Graham, B., Bodmin Summ. Ass. 1827; 1 Stark. Ev. 83, 3rd ed.; *per* Lord Denman, *Evans v. Rees*, 12 A. & E. 55, 40 E. C. L. It was once thought that an infant was bound to find sureties in such a case and could be committed in default, on the ground that his own recognizance would be invalid; but it has been since held that infancy is no ground for discharging a forfeited recognizance to appear at the assizes and prosecute for felony. *Ex parte Williams*, 13 Price, 670. It is still the

*108] *practice generally not to take the recognizance of a married woman, but that of her husband, or some person willing to be bound for her if any such there be; but if no such person be at hand,

she herself is frequently bound ; and there seems no reason why her recognizance should not be binding, especially since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), where she has separate property.

Formerly it was the practice to estreat indiscriminately all recognizances for the appearance of the prosecutor or witnesses when the witnesses did not appear ; but now, by the express provisions of the 7 Geo. 4, c. 64, s. 31, it is enacted, that "in every case where any person bound by recognizance for his or her appearance, or for whose appearance any other person shall be so bound to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy, shall therein make default, the officer of the court by whom the estreats are made out shall, and is hereby required to prepare a list in writing specifying the name of every person so making default, and the nature of the offence in respect of which every such person or his or her surety was so bound, together with the residence, trade, profession, or calling of every such person and surety, and shall in such list distinguish the principal from the sureties, and shall state the cause, if known, why each such person has not appeared ; and whether by reason of the non-appearance of such person the ends of justice have been defeated or delayed ; and every such officer shall, and is hereby required, before any such recognizance shall be estreated, to lay such list, if at a court of oyer and terminer and gaol delivery in any county besides Middlesex and London, or at a court of great sessions, or at any one of the superior courts of the counties palatine, before one of the justices of those courts respectively ; if at a court wherein a recorder or other corporate officer is the judge or one of the judges, before such recorder or other corporate officer ; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court, who are respectively authorized and required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just ; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justice, recorder, corporate officer, chairman, or justices of the peace before whom respectively such list shall have been laid."

Mode of compelling attendance of witnesses—by subpoena for prosecution. Where a witness is not bound by recognizance to appear he may be compelled to do so by *subpœna*.¹ This process is issued by the clerk of the peace at sessions, or by the clerk of the assize at the assizes, or it may be issued from the crown office. And the last is the most effectual mode, for not only, as will be seen presently, are the proceedings upon it for contempt more speedy and effective, but

¹ The defendant is entitled to a subpoena before the grand jury have found the bill. 1 Burr's Trial, 178 ; United States v. Moore, Wallace, 23. S.

On the powers of the U. S. District Attorney in summoning witnesses, see U. S. v. Durling, 4 Biss. 509.

it is itself more effectual, as it may be served anywhere in the United Kingdom.

In order to render the process to compel attendance of witnesses more effectual, it was provided by the 45 Geo. 3, c. 92, s. 3, that the services of a subpoena on a witness in any part of the United Kingdom, for his appearance on a criminal prosecution in any other part, shall be as effectual as if it had been in that part where he is required to *109] "appear. It has been held on this statute, that by the word "part" in this section is signified one of the great divisions, as Scotland or Ireland. *R. v. Brownell*, 1 Ad. & Ell. 598, 28 E. C. L. It does not seem, therefore, that any increased validity is thereby given to writs of subpoena issued from courts of limited jurisdiction, which at common law are only available within such jurisdiction.

Where there are writings or documents in the possession of a witness, which it is desired that he should produce on the trial, a clause of *duces tecum*, directing the witness to bring with him into court the documents in question, is added to the writ of *subpoena*. If the documents are in the possession of the party or his attorney, a notice to produce must be given. Where the documents are in the possession of the prosecutor, and the prisoner is desirous of having them produced upon the trial, the safest mode of proceeding appears to be to serve the prosecutor with a *subpoena duces tecum*, and not to rely upon a notice to produce, since it may be a question whether a prosecutor is so far a party to the proceeding as to be affected by a notice to produce.

The *subpoena duces tecum* is compulsory on the witness, and though it is a question for the decision of the presiding judge, whether the witness in court should produce the documents required, yet he ought to be prepared to produce them, if the judge be of that opinion. *Amey v. Long*, 9 East, 473; *R. v. Greenway*, 7 Q. B. 126, 53 E. C. L.¹

A solicitor served with a *subpoena duces tecum* is bound to produce a document in respect of which the prisoner is charged, although such document has been deposited with him by the prisoner on another occasion. *R. v. Brown*, 9 Cox, C. C. 281.

A person subpoenaed merely to produce a document need not be sworn; *Perry v. Gibson*, 1 A. & E. 48, 28 E. C. L.; and if sworn by mistake, is not liable to be cross-examined by the opposite party; *Rush v. Smyth*, 4 Tyrw. 675; 1 Cr. M. & R. 194. See further, *post*, Examination of Witnesses.

The prosecutor ought not to include more than four persons in one subpoena. *Doe v. Andrews*, Cowp. 845; *Tidd*, 855.

A subpoena requiring the party to attend a trial on the commission day extends to the whole assizes, which, by fiction of law, are supposed to last but one day. *Scholes v. Hinton*, 10 M. & W. 15.

If the party whose attendance is required be a married woman, the service should be upon her personally. *Goodwin v. West*, Cro. Car. 522; 2 Phill. Ev. 428, 10th ed.

¹ The *subpoena duces tecum* is not a process of right. 1 Burr's Trial, 137, 182; *Gray v. Pentland*, 2 Serg. & R. 31. S.

The witness must be personally served, by leaving with him a copy of the subpoena, or a ticket which contains the substance of the writ. 2 Phill. Ev. 427, 10th ed.; 3 Russ. Cri. 596, 5th ed.; 1 Stark. Ev. 77, 2nd ed.; *Maddeson v. Shore*, 5 Mod. 355. Where a copy only is served, the original must be shown to the witness, whether he require it or not, otherwise he cannot be attached. *Wadsworth v. Marshall*, 3 Tyrw. 218; 1 C. & M. 87. It must be served a reasonable time before the day of trial. Service upon a witness at two in the afternoon, in London, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too short. *Hammond v. Stewart*, 1 Str. 510; 3 Tidd, 856, 8th ed.

In a criminal case a person who is present in court, when called as a witness, is bound to be sworn and to give his evidence, although he has not been subpoenaed. An indictment for stopping up a way is a criminal case for this purpose. *Per Littledale, J., R. v. Sadler*, 4 C. * & P. 218, 19 E. C. L. So a witness being sworn, and [*110 having in court a document in his possession, is bound to produce it if required, though he have not received any notice to produce, nor been served with a *subpoena duces tecum*. *Dwyer v. Collins*, 7 Exch. R. 639; 21 L. J., Ex. 225.

Mode of compelling the attendance of witnesses—by subpoena for prisoner. In cases of misdemeanor, the defendant was always entitled to a writ of subpoena, but it was otherwise in capital cases, in which the party is not, at common law, entitled to call witnesses at all. In practice it had become common to allow witnesses for the prisoner to be heard in capital cases, about Lord Coke's time; but they did not give their testimony on oath, and could not be compelled to give their attendance. But by the 7 Will. 3, c. 3, s. 7, all persons indicted for high treason, whereby corruption of blood may ensue, shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them. And by the 1 Anne, st. 2, c. 9, all witnesses on behalf of a prisoner, for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury. Since that statute the process of subpoena is allowed to prisoners in case of felony. 2 Hawk. P. C. c. 46, s. 172. A witness who refuses, after having been subpoenaed to attend, to give evidence for a prisoner, is liable to an attachment in the same manner as if subpoenaed for the prosecution. 1 Stark. Ev. 86, 3rd ed.; *post*, p. 111. Witnesses for the defence may now be called before the magistrates, and bound over to appear at the trial. See 30 & 31 Vict. c. 35, s. 3, *post*, Appendix of Statutes.¹

Inspection of documents. Where letters necessary for the defence had been seized under a search-warrant, *Keating, J.*, made an order in

¹ The issuance of a subpoena is a matter of right. *Edmonton v. State*, 43 Texas, 230.

favor of the prisoner for an inspection of them. *R. v. Collucci*, 3 F. & F. 103.

Mode of compelling the attendance of witnesses—*habeas corpus ad testificandum*. Where a person required as a witness is in custody, or under the duress of some third person, as a sailor on board of a ship of war, so as to prevent his attendance, the mode of compelling is to issue a *habeas corpus ad testificandum*. For this purpose application must be made to the court before which the prisoner is to be tried, or to a judge, upon an affidavit, stating that the party is a material witness, and willing to attend. *R. v. Roddam*, Cowp. 672; 2 Phill. Ev. 429, 10th ed.; 1 Stark. Ev. 81, 3rd ed. The court will then, if they think fit, make a rule, or the judge will grant his *fiat* for a writ of *habeas corpus*; *R. v. Burbage*, 3 Burr. 1440; 2 Phill. Ev. 429, 10th ed.; which is then sued out, signed, and sealed. Tidd's Prac. 809.

Formerly, it was doubted whether persons in custody could be brought up as witnesses by writ of *habeas corpus*, to give evidence before any other courts than those at Westminster; but by the 43 Geo. 3, c. 140, a judge of the King's Bench or Common Pleas, or a baron of the Exchequer, may, at his discretion, award a writ of *habeas corpus ad testificandum*, for bringing any prisoner detained in any gaol in England before a court martial, or before commissioners of bankruptcy, commissioners for auditing the public accounts, *111] *or other commissioners, acting by virtue of any royal commission or warrant.

By the 44 Geo. 3, c. 102, U. K., the Judges of the King's Bench, or Common Pleas, or Barons of the Exchequer in England or Ireland, or the justices of oyer and terminer, or gaol delivery (being such judge or baron), have power to award writs of *habeas corpus*, for bringing prisoners, detained in gaol, before such courts, or any sitting at *nisi prius*, or before any court of record in the said parts of the said United Kingdom, to be there examined as witnesses, and to testify the truth before such courts, or before any grand, petit, or other jury, in any cause or matter, civil or criminal, which shall be depending, or to be inquired into, or determined, in any of the said courts.

The application under this statute ought to be to a single judge. *R. v. Gordon*, 2 M. & S. 582.

The writ should be left with the sheriff or other officer, who will then be bound to bring up the body, on being paid his reasonable expenses. 2 Phill. Ev. 430, 10th ed.; 1 Stark. Ev. 82, 3rd ed. If the witness be a prisoner of war, he cannot be brought up without an order from the Secretary of State. *Furly v. Newnham*, 2 Doug. 419.

A witness may be brought up on *habeas corpus* from a lunatic asylum, on an affidavit that he is fit for examination, and not dangerous. *Fennel v. Tait*, 5 Tyrw. 218; 1 Cr. M. & R. 584.

Mode of compelling the attendance of a witness—by warrant from the Secretary of State or judge. It is enacted by 16 & 17

Vict. c. 30, s. 9, that any Secretary of State, and any judge of the superior courts of Common Law at Westminster, may, if he think fit, "upon application by affidavit issue a warrant or order under his hand, for bringing up any prisoner or person, confined in any gaol, prison, or place, under any sentence or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending, or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order, to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner, in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of her Majesty's superior courts of law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."

Mode of compelling the attendance of witnesses—consequences of neglect to obey subpoena. Where a person who has been duly served with a subpoena, and who is able to do so, neglects to appear in obedience to it, he is punishable by attachment, and if taken under the attachment, he may be detained until he has given evidence upon the trial of the prisoner, and may then be set at liberty. 1 Chitty, C. L. 614.¹ The party disobeying is subject to an attachment although the cause was not called on. *Barrow v. Humphreys*, 3 B. & A. 598, 5 E. C. L. It is not necessary, in order to make a witness liable for disobeying a subpoena, that the jury should have been sworn. *Mullett v. Hunt*, 3 *Tyrw. 875; 1 Cr. & M. 752. Neither does it seem [*112 requisite that the party should have been called on his subpoena, particularly if he did not attend the court at all. *Dixon v. Lee*, 5 Tyrw. 180; 1 Cr. M. & R. 645; *R. v. Stretch*, 5 A. & E. 503, 31 E. C. L. But in order to ground a motion for an attachment, the affidavit must state that the party was a material witness. *Tinley v. Porter*, 2 M. & W. 822; and if it appear, by the notes of the judge at the trial or upon affidavit, that the testimony of the witness could not have been material, the rule for an attachment will not be granted. *Dicas v. Lawson*, 5 Tyrw. 235; 1 Cr. M. & R. 934.²

If the subpoena issued out of the crown office, the Court of Queen's Bench will, upon application, grant the attachment. *R. v. Ring*, 8 T. R. 585. When the process is not issued out of the crown office, and it is served in one part of the United Kingdom for the appearance of witness in another part, it is enacted by 45 Geo. 3, c. 92, ss.

¹ *United States v. Caldwell*, 2 Dall. 333. S. Where under the Alabama code an indictment is laid for refusing to obey a subpoena, it must contain a substantive description of the subpoena and its service. *Drake v. State*, 60 Ala. 62. An attachment may issue solely on the sheriff's return. *Wilson v. State*, 57 Ind. 71.

² The fact of the illness of a witness may be proved by the affidavit of the defendant. And in an application for a continuance upon such affidavit it is proper to refuse to issue an attachment for said witness. *Cutler v. State*, 42 Ind. 244.

3, 4, U. K., that the court issuing such process may, upon proof to their satisfaction of the service of the subpoena, transmit a certificate of the default of the witness under the seal of the court, or under the hand of one of the justices thereof to the Court of King's Bench if the service were in England, to the Court of Justiciary if in Scotland, and to the Court of King's Bench in Ireland, if in Ireland, which courts are empowered to punish the witness in the same way as if he had disobeyed a subpoena issued out of these courts, provided the expenses have been tendered. *Vide ante*, p. 108.

Where the subpoena has not issued from the crown office, application must be made to the court out of which the process issued; for it has been decided that disobedience to a subpoena issued by a court of quarter sessions is not a contempt of the Court of King's Bench. *R. v. Brownell, supra*. It has been said that justices in sessions have no power of proceeding against a party by attachment. *Hawk. P. C. bk. 2, c. 8, s. 33*, the authority for which appears to be the case of *R. v. Bartlett*, 2 Sess. Ca. 291. But courts of quarter sessions may fine an individual for a contempt in not obeying a subpoena, in like manner as it is their constant practice to fine jurors who do not attend when summoned. See *R. v. Clement*, 4 B. & Ald. 218, 6 E. C. L. It has been held, that if a witness refuses to give evidence before a court of quarter sessions, he may be fined, and imprisoned until the fine be paid. *R. v. Lord Preston*, 1 Salk. 278. And it can scarcely be doubted that he may be committed, though he may not be attached, for there is a distinction between commitment and attachment; see *R. v. Bartlett, ubi supra*; *Bac. Abr. Courts, E.* A peer of the realm is bound to obey a subpoena, and is punishable in the same manner as any other subject for disobedience. *Id.* If the witness can neither be attached or committed, he may be indicted.

Remuneration of witnesses. At common law there was no mode provided for reimbursing witnesses for their expenses in criminal cases; but by the 27 Geo. 2, c. 3; 18 Geo. 3, c. 19; and 58 Geo. 3, c. 70, provision was made for this purpose in cases of felony. By the 7 Geo. 4, c. 64, the above statutes are repealed, and the expenses of witnesses in most cases of misdemeanor, and all cases of felony, are now allowed, as also the expenses of witnesses for the defence called before the magistrates and bound by recognizance to appear at the trial. See 30 & 31 Vict. c. 35, s. 5, *post*, Appendix of Statutes. See *113] *also 29 & 30 Vict. c. 52, as to expenses before magistrates, *post*, tit. Practice. The various statutory provisions which empower courts of justice to grant costs in criminal cases, showing when witnesses will be entitled to them, will be found discussed at length under the title "Costs."¹

Witness bound to answer without tender of expenses. Where a subpoena is served on a person in one part of the United Kingdom for

¹ The daily compensation of a witness is not increased by the fact that he is subpoenaed in more than one case. *Harden v. Polk Co.*, 39 Iowa, 661.

his appearance in another, under the 45 Geo. 3, c. 92 (*ante*, p. 108), it is provided that the witness shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpoena, for defraying the expenses of coming, attending and returning. In this case, therefore, in order that the subpoena may be effectual, the expenses must be tendered. But this only applies to a witness brought from one great division of the United Kingdom, as Scotland or Ireland, to another.¹ *Supra*, p. 108. It has, indeed, been doubted whether in other criminal cases, a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a subpoena, and the doubt is founded upon the provision of the above statute. 1 Chitty, Cr. Law, 613. The better opinion, however, seems to be, and it is so laid down in books of authority, that witnesses making default on the trial of criminal prosecutions (whether felonies or misdemeanors) are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpoena, although the court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey. 2 Phill. Ev. 440, 10th ed.; 3 Russ. Cri. 599, 5th ed. "It is," says Mr. Starkie, "the common practice in criminal cases, for the court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid." 1 Ev. 83 (a) 2nd ed. And, accordingly, at the York summer assizes, 1820, Bayley, J., ruled, that an unwilling witness, who required to be paid before he gave evidence, had no right to demand such payment. His lordship said, "I fear I have not the power to order you your expenses;" and on asking the Bar if any one recollected an instance in point, Scarlett answered, "It is not done in criminal cases." 1 Anon., Chetw. Burn. 1001; 3 Russ. Cri. 599, 5th ed. (s). So on the trial of an indictment which had been removed into the Queen's Bench by *certiorari*, a witness for the defendant stated, before he was examined, that at the time he was served with the subpoena no money was paid him, and asked the judge to order the defendant to pay his expenses before he was examined. Park, J., having conferred with Garrow, B., said, "We are of opinion that I have no authority in a criminal case to order a defendant to pay a witness his expenses, though he has been subpoenaed by such defendant; nor is the case altered by the indictment being removed by *certiorari*, and coming here as a civil cause." *R. v. Cooke*, 1 C. & P. 321. In *R. v. Cousens*, Glouc. Spr. Ass. 1843, 3 Russ. Cri. 599, 5th ed., (s), Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpoena duces tecum* to go before the grand jury, although he objected on the ground that his

¹ Witnesses for the defendant in a prosecution for a misdemeanor are not bound to attend the trial, unless their fees are paid as in civil cases; otherwise in prosecutions for felony. *Chamberlain's Case*, 4 Cow. 49. [On the question whether experts can be compelled to testify without professional compensation in advance. *Buchman v. State*, 59 Ind. 1; *Dills v. State*, *Id.* 15.] The insufficiency of the sum tendered is of no avail, if no objection on that account was made by the witness at the time. *Ad-drews v. Andrews, Coleman*, 119; s. c. 2 Johns. Cas. 109. S.

expenses had not been paid. But the court might refuse to grant an attachment in the case of a poor witness, if his expenses were not paid.

*114] ***Protection of witnesses from arrest.** A witness attending to give evidence, whether subpoenaed or only having consented to attend (*Smith v. Stewart*, 3 East, 89), is protected from arrest *eundo morando et redeundo*. *Meekins v. Smith*, 1 H. Bl. 636. A reasonable time is allowed to the witness for going and returning, and in making this allowance the courts are disposed to be liberal. 1 Phill. Ev. 428, 10th ed.; 1 Stark. Ev. 90, 2nd ed. A witness residing in London is not protected from arrest between the time of the service of the subpoena and the day appointed for the examination; but a witness coming to town to be examined, is, as it seems, protected during the whole time he remains in town, *bona fide*, for the purpose of giving his testimony. *Gibbs v. Phillipson*, 1 Russell & Mylne, 19. It has been held that a person subpoenaed as a witness in a criminal prosecution, tried at the King's Bench sittings, but who was committed for a contempt of court in striking the defendant, has the same privilege from arrest in returning home after his imprisonment has expired, that he would have had in returning home from the court if he had not been so committed. *R. v. Wigley*, 7 C. & P. 4, 32 E. C. L. If a witness is improperly arrested, the court out of which the subpoena issued, or the judge of the court in which the case has been or is to be tried, will order him to be discharged. Arch. Cr. Law, 161, 9th ed. See 3 Stark. N. P. 132; see Arch. Pr. of the Q. B, 12th ed., 778-789, 791.¹

¹ The protection does not extend to the service of a summons unless in the actual presence of the court. *Blight's Ex. v. Fisher et al.*, Pet. C. C. 41. *Contra*, *Halsey v. Stewart*, 1 South. 366. See *Miles v. McCullough*, 1 Binn. 77; *Hays v. Shield*, 2 Y. 222; *Wetherill v. Seitzinger*, 1 Miles, 237. As a summons is a mere notice and does not interfere with the duties of a witness, it seems not within the reason of the rule. The case is different with a witness attending from another county, district, or State, and who ought not by reason of such attendance to be subjected to the inconvenience of defending a suit at a distance from his home. See *Hopkins v. Coburn*, 1 Wend. 292.

A witness attending before a magistrate under a rule to take his deposition is protected. *United States v. Edone*, 9 S. & R. 147. So a witness from another State. *Norris v. Beach*, 2 Johns. 294; *Sanford v. Chase*, 3 Cow. 381. So while at his lodgings, as well as going to or returning from court. *Hurst's Case*, 4 Dall. 387, s. c. 1 Wash. C. C. 136. But not after his discharge while engaged in his private affairs. *Smythe v. Banks*, 4 Dall. 329.

The privilege is personal and may be waived. *Brown v. Getchell*, 11 Mass. 11; *Fletcher v. Baxter*, 2 Atk. 224; *Prentis v. Commonwealth*, 5 Rand. 697.

As to writs of protection, see *Ex parte Hall*, 1 Tyler, 274; *Ex parte McNeil*, 3 Mass. 288. One who attends without a subpoena is not privileged though he may have the writ. *Ex parte Neil*, 6 Mass. 284. B.

•INCOMPETENCY OF WITNESSES

[*115]

FROM WANT OF UNDERSTANDING.

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It is for the court to decide upon the competency of witnesses, and for the jury to determine their credibility. It is the province of the former to judge whether there be *any* evidence; of the latter whether there be *sufficient* evidence.¹ Dougl. 375; B. N. P. 297; Rosc. N. P. Ev. 177, 13th ed.

Infant. It is said by Gilbert, C. B., that infants under the age of fourteen are not regularly admissible as witnesses, though there is no time fixed wherein they are to be excluded from evidence, but that the reason and sense of their evidence are to appear from the questions propounded to them, and their answers. Gilb. Ev. 144.² At one time their age was considered as the criterion of their compe-

¹ Cook et al. v. Mix, 11 Conn. 432. The question whether a witness is competent, though depending upon conflicting testimony, is for the court to decide, not the jury. Reynolds v. Lounsbury, 6 Hill, 534. S.

Character goes to the credibility, not the competency of a witness. A prostitute is a competent witness. State v. Shields, 45 Conn. 256. The credibility of a witness is altogether for the jury. Bowers v. People, 74 Ill. 418.

² A child over fourteen may be examined without previous interrogation. Den v. Vanden, 2 South. 589. Under fourteen is presumed incapable. State v. Dougherty, 2 Tenn. 80; Commonwealth v. Hutchinson, 19 Mass. 225. See Jackson v. Gridley, 18 Johns. 105. [Only upon a clear showing of an abuse of discretion will the appellate court review the action of the lower court in admitting the testimony of a child. Brown v. State, 6 Tex. App. 286; Ake v. State, 6 Tex. App. 398; State v. Richie, 28 La. An. 327.] The testimony of an infant of seven years, corroborated by circumstances, was held sufficient to justify a conviction for a rape. State v. La Blanc, 1 Const. Rep. 354. A child of any age, capable of distinguishing between good and evil, may be examined on oath; and the credit due to his statements is to be submitted to the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion. State v. Whittier, 21 Me. 341. [State v. Levy, 23 Minn. 104; Brown v. State, 2 Tex. App. 115.] In a criminal trial a child seven years of age may testify, but his credibility is a matter for the jury to consider. Washburn v. People, 10 Mich. 372. See also, Flanagan v. State, 25 Ark. 92; Warner v. State, Id. 447; Commonwealth v. Carey, 2 Brewst. 404. S. At a trial for an assault with intent to commit rape, the only witnesses were two girls, nine and eleven years old, whose testimony was elicited altogether by leading questions. The conviction upon this testimony so obtained was set aside. Coon v. People, 99 Ill. 368; s. c. 39 Am. Rep. 28.

The law has no qualification of age as to competency to testify in criminal matters. State v. Denis, 19 La. An. 119. S. Draper v. Draper, 68 Ill. 17; State v. Scanlon, 58 Mo. 204; Davidson v. State, 39 Tex. 129; Wade v. State, 50 Ala. 164.

Intelligence and not age is the proper rule. Draper v. Draper, 68 Ill. 17.

tency, and it was a general rule that none could be admitted under the age of nine years, very few under ten. *R. v. Traver*, 2 Str. 700; 1 Hale, P. C. 302; 2 Hale, P. C. 278; 1 Phill. Ev. 10th ed., 8. But of late years no particular age is required in practice to render the evidence of a child admissible. A more reasonable rule has been adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. 1 Phill. Ev. 4, 10th ed., 8. In *R. v. Brazier*, 1 East, P. C. 443; 1 Leach, 199, s. c., Blackstone, Nares, Eyre, and Butler, JJ., were of opinion that the evidence of a child five years of age would have been admissible, if she had appeared on examination to be capable of distinguishing between good and evil. But others of the judges, particularly Gould and Willes, JJ., held that the presumption of law, of want of discretion under seven, was conclusive. Subsequently all the judges agreed that a child of any age, if capable of distinguishing between good and evil, might be examined upon oath, and that a child of whatever age could not be examined unless sworn. This is now the established rule in all cases, civil as well as criminal, and whether the prisoner is tried for a capital offence, or one of an inferior nature. According to this rule the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also in part upon their having received a certain share of religious instruction. A child whose intellect appears to be in other respects sufficient to enable it to give useful evidence, may, from defect of religious instruction, be wholly unable to give any account of the nature of an oath, or of the consequences of falsehood. 1 Phill. *Ev. 9, 10th ed. In a recent case of trial for murder, where *116] it appeared that a girl eight years old, up to the time of the deceased's death, was totally ignorant of religion, but subsequently she had received some instruction as to the nature and obligation of an oath, but at the trial seemed to have no real understanding on the subject of religion, or a future state, Patteson, J., would not allow her to be sworn, observing, "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that previous to the happening of the circumstances, to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." *R. v. Williams*, 7 C. & P. 320, 32 E. C. L. Mr. Pitt Taylor observes upon this case (Ev. 1077, 2nd ed.), "Perhaps the language which the learned judge is reported to have used was somewhat stronger than the law warranted, and it certainly went further than the facts required, as the child, even when offered as a witness, had no real knowledge of the nature of an oath. Had not this been the case, it seems difficult to understand upon what valid ground her testimony could have been

rejected; for whether she was instructed in religious knowledge previously or subsequently to the commission of the crime in question, or whether the instruction was intended to excite permanent feelings or merely to secure the temporary purpose of enabling her to swear to the facts she had witnessed, can signify nothing, provided that at the time when she was called upon to give her evidence, she was really aware of the solemn responsibility which devolved upon her of speaking the truth. Accordingly in Ireland it has been held that even on an indictment for murder, an infant might be examined, though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness." *R. v. Milton*, Ir. Cir. Rep. 61, *per* Doherty, C. J. In *R. v. Nicholas*, 2 C. & K. 246, 61 E. C. L., Pollock, C. B., refused to put off the trial in order that a child of six years old might receive instruction, but said that he thought there were cases in which such application might be entertained; and that the judge should act according to his discretion.

Where a case depends upon the testimony of an infant, it is usual for the court to examine him as to his competency to take an oath, previously to his going before the grand jury, and if found incompetent, for want of proper instruction, the court will, in its discretion, put off the trial, in order that the party may, in the meantime, receive such instruction as may qualify him to take an oath. 1 Stark. Ev. 94, 2nd ed. This was done by Rooke, J., in the case of an indictment for rape, and approved of by all the judges. 1 Leach, 430 (n); 2 Bac. Ab. by Gwill. 577 (n).¹ An application to postpone the trial upon this ground ought properly to be made before the child is examined by the grand jury; at all events, before the trial has commenced, for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge ought not to discharge the jury upon this ground. 1 Phill. Ev. 19, 10th ed., citing *R. v. Wade*, *post*, tit. Practice. There the witness was *an adult, but the principle seems to apply equally to the [*117 case of a child. If a child is, from want of understanding, incapable of giving evidence upon oath, proof of its declaration is inadmissible. *R. v. Tucker*, 1808, MS.; 1 Phill. Ev. 10, 10th ed.; Anon., Lord Raym, cited 1 Atk. 29.

Degree of credit to be given in testimony of infants. It is said by Blackstone, that "where the evidence of children is admitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded solely on the unsupported testimony of an infant under years of discretion." 4 Com. 214. In many cases undoubtedly the statements of children are to be received with great caution, but it is clear that a

¹ *Jenner's Case*, 2 Rog. Rec. 147. S.
See *Commonwealth v. Lynes*, 142 Mass. 577; *Coon v. People*, 99 Ill. 368; s. c. 39 Am. Rep. 28.

person may be legally convicted upon such evidence alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given. 1 Phill. Ev. 11, 10th ed.¹

It may be observed that the preliminary inquiry usually made for ascertaining their competency is not always of the most satisfactory nature, and sometimes is of such a description that merely by a very slight practising of the memory, a child might be made to appear competent and qualified as a witness. The inquiry is commonly confined to the ascertaining of the fact whether a child has a conception of divine punishment being a consequence of falsehood, it seldom extends so far as to ascertain the child's nature of an oath, and scarcely ever relates to the legal punishment of perjury. Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons. What is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive. 1 Phill. Ev. 11, 10th ed.

Deaf and dumb persons. It was formerly held that a person born deaf and dumb was, *prima facie*, in contemplation of law an idiot. *R. v. Steel*, 1 Lea, C. C. 452; but this presumption has been disputed by Wood, V. C., in *Harrod v. Harrod*, 1 Kay & J. 9. If it appear that such person has the use of his understanding, he is criminally answerable for his acts, 1 Hale, P. C. 37, and is also competent as a witness.² Thus where a man deaf and dumb from birth, was produced as a witness on a trial for larceny, he was allowed to be examined through the medium of his sister, who was sworn to interpret to the witness "the questions and demands made by the court to the witness, and the answers made to them." The sister stated, that for a series of years she and her brother had been able to understand one another by means of certain arbitrary signs and motions, which time and necessity had invented between them. She was certain that her brother had a perfect knowledge of the tenets of Christianity, and that she could communicate to him notions of the moral and religious nature of an oath, and of the temporal dangers of perjury. *R. v. Ruston*, 1 Leach, 408. So, in Scotland, upon a trial for rape, the woman, who was deaf and dumb, but had been instructed by teachers, *118] *by means of signs, with regard to the nature of an oath, of a trial, and of the obligation of speaking the truth, was admitted to be examined. *R. v. Martin*, 1823, Alison's Prac. Crim. Law of

¹ The tender age of such witness affords cogent reasons why leading questions should not be allowed. *Coon v. State*, 99 Ill. 368; s. c. 39 Am. Rep. 28.

² *State v. De Wolf*, 9 Conn. 98. When the witness can, it is better to make him write his answers. *Morrison v. Leonard*, 3 Ca. & P. 127, Eng. Com. L. Reps. xiv. 238; *Snyder v. Nations*, 5 Blackf. 296. S.

As to interpreters, see *People v. Ah Wee*, 48 Cal. 236.

Scotl. 486 ; and see *R. v. Whitehead*, L. R. 1 C. C. R. 33, *post*, tit. Examination of Witnesses.

Idiots and lunatics. Persons not possessing the use of their understanding, as idiots, madmen, and lunatics, if they are either continually in that condition, or subject to such a frequent recurrence of it as to render it unsafe to trust to their testimony, are incompetent witnesses.

An idiot is a person who has been *non compos mentis* from his birth, and who has never any lucid intervals, Co. Litt. 247 ; Bac. Ab. Idiot (A 1), and cannot be received as a witness. Com. Dig. Testm. (A 1.)

A lunatic is a person who enjoys intervals of sound mind, and may be admitted as a witness, *in lucidis intervallis*. Com. Dig. Testm. (A 1.) He must of course have been in possession of his intellect at the time of the event to which he testifies, as well as at the time of examination ; and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination for the events he has witnessed. Alison's Prac. C. P. of Scotl. 436. With regard to those persons who are afflicted with *monomania*, or an aberration of mind on one particular subject, not touching the matter in question, and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy the extent and influence of such a state of mind.

Where a lunatic is tendered as a witness, it is for the judge, assisted by medical testimony, to determine whether he shall be admitted, and if, upon his examination upon the *voir dire*, he exhibits a knowledge of the religious nature of an oath, and appears capable of giving an account of transactions of which he has been an eye-witness, it is a ground for his admission. It is for the jury to judge of the credit that is to be given to his testimony. *R. v. Hill*, 2 Den. C. C. R. 254.¹

¹ *Livingston v. Kiersted*, 10 Johns. 362. The question whether a witness, sane at the time he testifies, was insane at the time of the transaction with regard to which he testifies, goes to the credibility of his testimony, and not to his competency, and is therefore a subject for evidence to the jury, to be adduced by the opposing party with his other evidence. *Holcomb v. Holcomb*, 28 Conn. 177. A person in a state of intoxication is inadmissible. *Gebbart v. Skinner*, 15 S. & R. 235. It is no objection either to the competency or credibility of a witness, that he is subject to fits of mental derangement, if it appears that he is sane at the time he is offered. *Campbell v. State*, 23 Ala. 44. Insanity of witness at the time he testifies is a question of competency for the court. *Holcomb v. Holcomb*, 28 Conn. 177. S.

* Idiots are incompetent witnesses. *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865.

*119] *FROM WANT OF RELIGIOUS BELIEF.

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General rules. The various statutes, and the cases upon them, with respect to the taking of oaths by witnesses, are of diminished importance in consequence of certain recent statutes to be presently noticed, *post*, p. 122, *et seq.*; but it may still become necessary in some cases, to refer to the old law upon the subject. It is an established rule that all witnesses who are examined upon any trial, civil or criminal, must give their evidence under the sanction of an oath, or some affirmation substituted in lieu thereof.¹ This rule is laid down as an acknowledged proposition by some of our earliest writers; Sheppard's Abridg. Tryal; and it appears to be of universal application, except in the few cases in which a solemn affirmation has been allowed by statute (see *post*) in lieu of an oath. No exemption from this obligation can be claimed in consequence of the rank or station of a witness. A peer cannot give evidence without being sworn; Lord Shaftsbury *v.* L. Digby, 3 Keb. 631; *R. v.* Lord Preston, 1 Salk. 278; and the same appears to be the case in regard to the king himself; 2 Rol. Abr. 686; Omichund *v.* Barker, Willes' Rep. 550. The rule also holds even in the case of a judge; Kel. 12; or juryman; Bennett *v.* Hundred of Hertford, Sty. 233; Fitzjames *v.* Moys, 1 Sid. 133; Kitchen *v.* Manwaring, cited Andr. 321; 7 C. & P. 648, 32 E. C. L.; who happens to be cognizant of any fact material to be communicated in the course of a trial. 1 Phill. Ev. 13, 10th ed. An examination on oath implies that a witness should go through a ceremony of a particular import, and also that he should acknowledge the accuracy of that ceremony, to speak the truth. 1 Phill. Ev. 14, 10th ed. It is therefore necessary, in order that a witness's testimony should be received, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. Id. 15, 10th ed. It is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. *R. v.* Ruston, 1 Leach, C. C. 455. Atheists, therefore, and such infidels as do not possess any religion that can bind their consciences to speak the truth, are excluded from being witnesses. Bull. N. P. 292; Gilb. Ev. 129. Although it was formerly held that infidels (that is to say, persons professing some other than the Christian faith) could not be witnesses, on the ground that they were

¹ Where a witness has testified without being sworn, his evidence must be stricken out. *Thompson v. State*, 37 Texas, 121.

under none of the obligations of our religion, and therefore could not be under the influence of the oaths which our courts administer; *Gilb. Ev. 142; yet a different rule has since prevailed; and it is now well settled, since the case of *Omichund v. Barker*, [*120 Willes, 549, that those infidels who believe in a God, and that he will punish them if they swear falsely, may be admitted as witnesses in this country.¹

¹ Persons who do not believe in the obligation of an oath, and a future state of rewards and punishments, are incompetent witnesses. *Curtiss v. Strong*, 4 Day's Con. Rep. 51; *Wakefield v. Ross*, 5 Mason, 16; *State v. Cooper*, 2 Tenn. 96. It is not enough to believe in God, and that men are punished in this life. *Atwood v. Wilton*, 7 Conn. 66. (Altered in Connecticut by legislative enactment, May, 1830.) But the witness need not believe in the eternity of future punishment. *Butts v. Smartwood*, 2 Cow. 431, 433 n., 572 n. His belief may be proved from his previous declarations and avowed opinions, and he cannot be admitted to explain them himself. *Curtiss v. Strong*, 4 Day's Con. Rep. 51; *Norton v. Ladd*, 4 N. H. 444; *State v. Petty*, 1 Harp. 62; *Jackson v. Gridley*, 18 Johns. 98. He may show reform of conduct and opinion since the declarations proved. *Id.* A single declaration of disbelief proved, is not enough. *Case of Thornton et al.*, Bucks Co., Pa. Pamph. One who does not believe in the existence of a God is not a competent witness, and the fact may be established by the testimony of other witnesses. *Thurston v. Whitney*, 2 Cush. 104. *Contra*, that disbelief in a future state goes only to credit. *Hunseum v. Hunseum*, 15 Mass. 184. And see *Noble v. People*, 1 Bru. 29; *Easterday v. Hilborne*, Wright, 345. Any person who believes in the existence of a God or a Supreme Being, who is the just moral Governor of the universe, who will, either in this life or the next, reward virtue and punish vice, and who feels that an oath will be binding upon his conscience, cannot be excluded from giving his testimony on the ground of his religious belief. *Arnold v. Arnold*, 13 Vt. 362. The true test of a witness's competency on the ground of his religious principles is, whether he believe in the existence of a God who will punish him if he swear falsely; and within this rule are comprehended those who believe future punishments not to be eternal. *Cubbison v. McCreary*, 2 W. & S. 262. One who believes in the existence of God, and that an oath is binding on the conscience is a competent witness, though he does not believe in a future state of rewards and punishments. *Brock v. Milligan*, 10 O. 121. A person who believes that there is no God, is not a competent witness. To prove this it is competent to show his settled and previous declarations on the subject. Though the witness may have been for this reason incompetent, yet if the objection has been removed by a change of views he should be examined. *Scott v. Hooper*, 14 Vt. 535. The declarations of a witness are competent evidence of his disbelief of the existence of a Supreme Being. *Smith v. Coffin*, 18 Me. 157. Although after the proof of such declarations, an honest change of opinion may be shown, and the proposed witness thereby rendered competent, yet the testimony of another person that the witness offered was then, and for many years next preceding, had been a Universalist, and was an active member of a Universalist society, and has ever been and then was a firm believer in the Christian religion, was held to be inadmissible. *Id.* When declarations of disbelief are proved, the person offered as a witness cannot be permitted to testify to his belief in a Supreme Being in order to qualify himself for admission. *Id.* To show a witness incompetent from a defect of religious belief, his conversation or declarations on religious topics are admissible. *Bartholemey v. People*, 2 Hill, 249. See *Quinn v. Crowell*, 4 Whart. 334. A belief in a future state of rewards and punishments, or a belief in the inspired character of the Bible, are not essential to the competency of a witness. It is enough if he believes in a God, who will punish false swearing. *Blair v. Seaver*, 26 Pa. St. 274; *Shaw v. Moore*, 4 Jones' Law, 25. The incompetency of a witness for want of religious belief, may be proved at the option of the party seeking to exclude him either by the *voire dire* or by evidence of his declarations previously made. *Harrel v. State*, 1 Head, 125. The want of religious belief in a witness cannot be shown by examination of the witness himself. *Commonwealth v. Smith*, 2 Gray, 516. As to incompetency for religious belief, see *Central Military Tract, R. R. Co. v. Rockafellow*, 17 Ill. 541; *Commonwealth v. Burke*, 82 Mass. 33; *Anderson v. Maberry*, 2 Heisk. 653; *Commonwealth v. Winnemore*, 2 Brews. 375; *Dinkle v. Kohn*, 44 Ga. 266. S.

Where a statute allows a defendant to testify, he is not disqualified by a want of religious belief. *Commonwealth v. Kauffman*, 1 County Ct. Rep. (Pa.) 410.

It was said by Willes, C. J., that he was clearly of opinion that those infidels (if any such there be) who either do not believe in a God, or if they do, do not think that he will either reward or punish them in this world or the next, cannot be witnesses in any case, nor under any circumstances, for this plain reason, that an oath cannot possibly be any tie or obligation upon them. *Omuchund v. Barker*, Willes, 538, 1 Atk. 21. A witness was rejected on this ground by Grose, J., at the Bedford Spring Assizes, 1789, on an indictment for murder. *Anon.*, 1 Leach, 241 (n).

An adult witness will, of course, be presumed to profess those principles of religion which render him a competent witness.

What the exact question is which is the subject of inquiry in such a case does not appear to be fully decided. The witness must believe in the existence of a Divine Power, who would be offended by perjury, and would be capable of punishing it. The doubt has been whether it is also necessary that the witness should believe in a future state of rewards and punishments; from the case of *Omuchund v. Barker*, it seems that Willes, C. J., thought that the expectation of temporal punishment proceeding from a Divine Power was sufficient.

There has also been some dispute as to the mode in which the state of the witness's belief is to be ascertained. The preponderance of authority is in favor of the witness being himself examined as to his religious opinion. 1 Phill. Ev. 17, 10th ed.; *The Queen's case*, 2 B. & B. 284, 6 E. C. L.; *R. v. Taylor*, 1 Peake, N. P. 11; *R. v. White*, 1 Lea, 430; *R. v. Serva*, *infra*; Best, Ev. 208. It is, however, the opinion of some writers (and this opinion is supported by the practice in America), that the witness ought not to be questioned at all, but that the fact should be proved by the oath of persons acquainted with him. Mr. Best (*ubi supra*) strongly contends that evidence both of the party himself and others is admissible on the point.

The inquiry can never be carried further, if the witness himself asserts his belief. Thus in *R. v. Serva*, 2 C. & K. 53, 61 E. C. L., a negro, who was called as a witness, stated, before he was sworn, that he was a Christian, and had been baptized; Platt, B., held that he might be sworn, and that no further question could be asked before he was so.

In *R. v. James*, 6 Cox, C. C. 5, after the jury had delivered their verdict, it was discovered that one of the witnesses had not been sworn; the jury were then directed to reconsider their verdict, and to leave out of their consideration the evidence given by the unsworn witness.

It is not yet settled by the Scotch law, whether a witness professing his disbelief in a God, and in a future state of rewards and punishments is admissible. "When the point shall arrive," says Mr. Alison, "it is well worthy of consideration, whether there is any rational ground for such an exception;—whether the risk of allowing unwilling witnesses to disqualify themselves by the simple expedient of alleging that they are atheists, is not greater than that of admitting

the testimony of such as make this profession." 2 Alison, Prac. Cr. L. *Scotl. 438. The policy of the rule has also been questioned by [*121 English text writers. Best, Ev. 212.

Form of the oath. The particular form or ceremony of administering an oath is quite distinct from the substance of the oath itself. 1 Phill. Ev. 14, 10th ed. The form of oath under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of God; it being vain to compel a man to swear by a God in whom he does not believe and whom he therefore does not reverence. Puffend. b. 4, c. 2, s. 4. The rule of our law therefore is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such a manner as they may consider binding on their consciences.¹ 1 Phill. Ev. 14, 10th ed. *Per* Alderson, B., in *Miller v. Salomons*, 7 Ex. R. 534, 535; and *per* Pollock, C. B., *Id.* 558. A Jew consequently is sworn upon the Pentateuch, with his head covered. 2 Hale, P. C. 279; *Omichund v. Barker*, Willes, 538. But a Jew who stated that he professed Christianity, but had never been baptized, nor even formally renounced the Jewish faith, was allowed to be sworn on the New Testament. *R. v. Gilham*, 1 Esp. 285. A witness who stated that he believed both the Old and New Testament to be the word of God, yet as the latter prohibited, and the former countenanced swearing, he wished to be sworn on the former, was permitted to be sworn. *Edmonds v. Rowe*, Ry. & Moo. N. P. C. 77. So where a witness refused to be sworn in the usual form, by laying his right hand on the book, and afterwards kissing it, but desired to be sworn by having the book laid open before him, and holding up his right hand; he was sworn accordingly. *Colt v. Dutton*, 2 Sid. 6; Willes, 553. And where on a trial for high treason, one of the witnesses refused to be sworn in the usual manner, but put his hands to his buttons; and in reply to a question, whether he was sworn, stated that he was sworn and was under oath; it was held sufficient. *R. v. Love*, 5 How. St. Tr. 113. A Scotch witness has been allowed to be sworn by holding up the hand without touching the book, or kissing it, and the form of the oath administered was, "You swear according to the custom of your country, and of the religion you profess, that the evidence, etc., etc." *R. v. Mildrone, Leach*, 412; *Mee v. Reid, Peake*, N. P. C. 23. Lord George Gordon, before he turned Jew, was sworn in the same manner, upon exhibiting articles of the peace in the King's Bench. MS. M'Nall on Ev. 97. In Ireland it is the practice to swear Roman Catholic witnesses upon a Testament with a crucifix or cross upon it. *Id.* The following is also given as the form of a Scotch Covenanter's oath: "I, A. B., do swear by God

¹ That form of oath is to be used which the witness holds obligatory. *Curtiss v. Strong*, 4 Day's Con. Rep. 51. A Chinaman who stated that he did not know the name of the book he was sworn on, but that he believed that if he should state anything untrue the court would punish, and that after his death, he would "go down there," making an emphatic gesture downward with his hand, held to be a competent witness. *The Memmic*, 1 Bened. D. C. 490. S.

Himself, as I shall answer to Him at the great day of judgment, that the evidence I shall give to the court and jury, touching the matter in question, is the truth, the whole truth, and nothing but the truth, So help me God." 1 Leach, 412 (n); R. v. Walker, O. B. 1788; Id. A Mahomedan is sworn on the Koran. The form in R. v. Morgan, 1 Leach, 54, was as follows:—The witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo has been received, who touched with his hand the foot of a Brahmin. *122] *Omichund v. Barker*, Willes, 538; 1 Atk. 21. The following is given in a recent case as the form of swearing a Chinese. On entering the box the witness immediately knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The crier of the court then, by direction of the interpreter, administered the oath in these words, which was translated by the interpreter into the Chinese language, "You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer." R. v. Entrehman, Carr. & M. 248, 41 E. C. L.

The 1 & 2 Vict. c. 105, s. 1, U. K., enacts that "in all cases in which an oath may lawfully be and shall have been administered to any person either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, *provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding*; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

A witness may be asked, whether he considers the form of administering the oath to be such as will be binding on his conscience. The most correct and proper time for asking a witness this question is before the oath is administered; but as it may happen that the oath may be administered in the usual form, by the officer, before the attention of the court, or party, or counsel is directed to it, the party is not to be precluded; but the witness may, nevertheless, be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answers in the affirmative he cannot then be further asked, whether there be any other mode of swearing more binding upon his conscience. The Queen's case, 2 Br. & B. 284, 6 E. C. L. So where a person, who was of the Jewish persuasion at the time of trial, and an attendant on the synagogue, was sworn on the Gospels as a Christian, the court refused a new trial on this ground; being of opinion that the oath as taken was binding on the witness, both as a

religious and moral obligation ; and Richardson, J., added, that if the witness had sworn falsely, he would be subject to the penalties of perjury. *Sells v. Hoare*, 3 Br. & B. 232, 7 E. C. L. ; 7 B. Moore, 36.

Affirmation in lieu of oath. Formerly it was necessary in all cases that an oath, that is a direct appeal to the Divine Power, should be made by the witness. Many conscientious persons have objected to this, and various sects have been established, part of whose religious creed it is to do so. In order to prevent the difficulty which arose from large classes of the community being thus rendered unavailable as witnesses, various statutes have from time to time been passed exempting such persons from the necessity of taking the usual form of oath, and allowing them to substitute a solemn affirmation in its stead. Thus, by the 9 Geo. 4, c. 32, s. 1, U. K., "every Quaker or Moravian who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration, in the words following:—'I, A. B., being one of the people *called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, *as the case may be*], do solemnly, sincerely, and truly declare and affirm,' which said affirmation or declaration shall be of the same force and effect in all courts of justice and other places, where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form ; and if any person making such declaration or affirmation shall be convicted of having wilfully, falsely, and corruptly affirmed or declared, any matter or thing, which if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures, to which persons convicted of wilful and corrupt perjury are or shall be subject."¹

By the 3 & 4 Will. 4, c. 49, U. K., Quakers and Moravians are permitted to take an affirmation or declaration, instead of taking an oath, "in all places, and for all purposes whatsoever, where an oath is or shall be required, either by the common law, or by any Act of Parliament ;" and any such affirmation or declaration, if false, is punishable as perjury.

Where a prosecutor, who had been a Quaker, but had seceded from the sect, and called himself an evangelical friend, stated that he could not affirm according to the form, either in the 9 Geo. 4, c. 32, or in the 3 & 4 Will. 4, c. 49, and he was allowed to give evidence under a general form of affirmation ; the judges were unanimously of opinion that his evidence was improperly received. *R. v. Doran*, 2 Lew. C. C. 27 ; 2 Moo. C. C. 37.

This case led to the passing of the 1 & 2 Vict. c. 77, U. K., which enacts that any person who shall have been a Quaker or a Moravian may make solemn affirmation and declaration, in lieu of taking an

¹ A witness who has no objections to be sworn may not be affirmed. *Williamson v. Carrol*, 1 Harrison, 271. S.

oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form; and such affirmation or declaration, if false, is punishable as perjury. Every such affirmation or declaration is to be in the words following:—"I, A. B., having been one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, *as the case may be*], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm."

By the 3 & 4 Will. 4, c. 82, U. K., the class or sect of dissenters called Separatists, when required upon any lawful occasion to take an oath, in any case where by law an oath is or may be required, are also allowed to make an affirmation or declaration instead, in the words following:—"I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare, that I am a member of the religious sect called Separatists, and that the taking of an oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare," etc.

But besides the persons comprised within these sects, other persons called as witnesses not infrequently refused to be sworn from what they asserted to be conscientious motives, it is, therefore, provided by the 24 & 25 Vict. c. 66, s. 1, that if any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required, *124] *or desiring to make an affidavit or deposition in any criminal proceeding, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following:—"I, A. B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and I do also solemnly, sincerely, and truly affirm and declare," etc. Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. By s. 2, "if any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury." Finally, it is enacted by the 32 & 33 Vict. c. 68, s. 4, that, "if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an

oath would have no binding effect on his conscience make the following promise and declaration :—‘ I hereby solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.’ ” By the same section the witness is liable to be tried for perjury.

Persons excommunicated, or under sentence of death. It was formerly considered that persons excommunicated could not be witnesses ; but by the 53 Geo. 3, c. 127, s. 3, persons excommunicated shall incur no civil disabilities. It seems that a person under sentence of death is incompetent to be a witness, and his capacity as a witness is not restored by the 6 & 7 Vict. c. 85, s. 1, *per* Lush, J., *R. v. Webb*, 11 Cox, C. C. 133.¹

¹ A prisoner under sentence of death is a competent witness. *State v. Harston*, 63 N. C. 294. S.

As to right of a convict indicted for murder of a fellow convict to testify on his own behalf that he had not endeavored to suborn witnesses on the main charge. See *Donahue v. People*, 56 N. Y. 208. On the disqualification arising from a conviction. *Holloway v. Commonwealth*, 11 Bush, (Ky.) 344 ; *Wharton's Crim. Ev.*, § 363, and notes, 9th ed. Under Ohio code previous conviction goes to the witness's credibility, but does not render him incompetent. *Brown v. State*, 18 O. St. 496. In Virginia a witness is not disqualified by conviction of petit larceny. *Barbour v. Commonwealth*, 80 Va. 287. In New York a conviction affects a witness's credibility not his competency. *People v. Sweeny*, 4 N. Y. Crim. Rep. 275. To effect the witness's credibility, the conviction must be such as, independently of the code, would have rendered the convict incompetent to testify. *Cobb v. State*, 31 O. St. 100. A summary conviction before a magistrate does not incapacitate. *Cheatham v. State*, 59 Ala. 40. Nor conviction of a misdemeanor. *Welsh v. State*, 3 Tex. App. 114. Conviction without judgment works no disability. *Blanfus v. People*, 69 N. Y. 107. Disability by infamy may be removed by a pardon by the executive. *United States v. Wilson*, 7 Peters, 150. A pardon makes the witness competent even when it states the date of conviction incorrectly, if it is intended to cover and does cover the particular offence. *Martin v. State*, 21 Tex. App. 1. The mere fact that the witness is at large will not raise a presumption that he has been pardoned. But he may be interrogated as to whether he has received a pardon, and if he states that he has been, the production of the pardon is not necessary to establish his competency. *Howser v. Commonwealth*, 51 Pa. St. 332 ; *Schell v. State*, 2 Tex. App. 30.

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*FROM INTEREST.

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To what extent interest is still a ground of incompetency—husband and wife. Incompetency from interest was removed to a great extent by the 6 & 7 Vict. c. 85, and almost entirely by the 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.¹ An important exception, however, was expressly made in criminal cases with regard to husbands and wives, who remain, as at common law, incompetent witnesses either *for or against* each other. (See 14 & 15 Vict. c. 99, s. 3, and 16 & 17 Vict. c. 83, s. 3), except under the Married Women's Property Act, and one or two other Acts mentioned *infra*.²

¹ The statutes generally do not allow parties to be witnesses in criminal proceedings. *Hoagland v. State*, 17 Ind. 488; *Williams v. People*, 33 N. Y. 688; 45 Barb. 201; *State v. Felner*, 19 Wis. 561; *State v. Fee*, Id. 562; *Buckman v. Perkins*, 55 Me. 490; *Patterson v. People*, 46 Barb. 625. [But see *infra*, page *130. See generally *Stonecipher v. Hall*, 64 Ill. 121; *Fosgate v. Thompson*, 54 N. H. 455; *McFerren v. Montalto Iron Co.*, 76 Pa. St. 180; *Manion v. Lambert*, 10 Bush, (Ky.) 295; *Wheeler v. Arnold*, 30 Mich. 304; *Marten v. Jones*, 59 Mo. 181; *Graham v. Howell*, 50 Ga. 203; *Monroe v. Napier*, 52 Ga. 385; *Strickland v. Wynn*, 51 Ga. 600; *Texas v. Chiles*, 21 Wall. 488; *Reeves v. Shry*, 39 Tex. 634; *Stewart v. Glenn*, 58 Mo. 481.]

The fact that the prosecutor on the trial of an indictment for larceny is a party to a civil suit, which is pending for an alleged trespass in taking the stolen goods, does not make him incompetent as a witness. *State v. McGrew*, 13 Rich. (Law) 316. [*Gassenheimer v. State*, 52 Ala. 313.] The rule that an attesting witness must be called is not altered by the passage of a statute authorizing parties to testify. *Brigham v. Palmer*, 3 Allen, 450. A defendant in a criminal prosecution should be allowed to testify as to what he said in a conversation and explain its meaning, when the conversation had been previously testified to by a witness for the prosecution. *People v. Farrell*, 31 Cal. 576 [*Morrow v. State*, 48 Ind. 432.] A defendant in a criminal trial, offering himself as a witness waives his right to object to any question pertinent to the issue. *Commonwealth v. Lannan*, 13 Allen, 563. S.

² *Snyder et al. v. Snyder*, 6 Bin. 488; *Daniel v. Proctor et al.*, 1 Dev. 428; *Higden v. Higden*, 6 J. J. Marsh. 53; *Lucas v. State*, 23 Conn. 13. [*Stanley v. Schultz*, 47 Ind. 217; *Furrow v. Chapin*, 13 Kan. 107; *Harriman v. Stowe*, 57 Mo. 93; *Farnsworth v. Ebbs*, 2 Hun, (N. Y.) 438; *Bates v. Cilley*, 47 Vt. 1; *Wilke v. People*, 53 N. Y. 525. On slaves and free colored persons, see *Williams v. State*, 33 Ga. 85.] Though separated by articles. *Terry v. Belcher*, 1 Bail. 568. But she has been held competent

The rule is, in general, absolute, and cannot be waived. It excludes them from giving evidence, not only of facts, but of statements made by either in the nature of admissions.¹ But any conversation between husband and wife may be proved by third persons who are present at or overhear it. *R. v. Smithie*, 5 C. & P. 332, 24 E. C. L.; *R. v. Simons*, 6 C. & P. 540, 25 E. C. L.; *R. v. Bartlett*, 7 C. & P. 832, 32 E. C. L.²

But the rule only extends to cases where the husband or wife are actually on their trial. It was once thought otherwise, but the mistake seems to have arisen from not having drawn the distinction clearly enough between competency and privilege. See p. 127.

Where the relation of husband and wife has once subsisted, and the one is an inadmissible witness for or against the other, they remain so even after the relation has ceased, with respect to matters which occurred during the continuance of the relation. Thus, where a woman divorced by Act of Parliament, and married again, was called to prove a contract by her former husband, she was rejected by Lord

for her husband in an action of book debts. *Stanton v. Willson et al.*, 3 Day, (Conn.) 37. And in forcible entry and detainer, the wife of the prosecutor is a good witness to prove the force, but only the force. *Resp. v. Shryber*, 1 Dall. 68. A release to baron and feme, he being absent, will make her a good witness. *Commonwealth v. Briggs*, 5 Pick. 429; *Dwiley v. Dwiley*, 46 Me. 377; *Walker v. Sanborn*, Id. 470; *Bird v. Hunston*, 10 O. St. 418. The conjugal relation will not prevent a woman from testifying as to whether she has had intercourse with other men than her husband. *Chamberlain v. People*, 9 Smith, 85. Neither husband nor wife is competent to prove non-access. Id. The mother of a bastard child who is a married woman, though from necessity she is a competent witness to prove the illicit intercourse, and who is in fact the father of the child, is not competent to prove the non-access of the husband, his absence from the State, nor any fact which can be proved by other testimony. *People v. Ontario*, 15 Barb. 286. S. The common law is not altered by the Ohio code. *Shultz v. State*, 32 O. St. 276.

¹ *Burger v. Tribble*, 2 Dana, 333; *Moody v. Fulmer*, Wharton's Dig. 308; *Smith v. Scudder*, 11 S. & R. 325; *Sackit v. May*, 3 Dana, 80. Unless they form a part of the *res gestæ*. *Park v. Hopkins*, 2 Bail. 408; *Thomas v. Hargrave*, Wright (O.) 595. On an indictment against husband and wife, her admissions are good against herself, but not against him. *Commonwealth v. Briggs*, 5 Pick. 429. [*Kingen v. State*, 60 Ind. 557. And so on her own behalf, even though her husband benefits thereby. *Rogers v. Rogers*, 46 Ind. 1.] Facts known to a widow, which did not come to her knowledge by reason of her relation as wife, she is competent to testify. *Walker v. Sanborn*, 46 Me. 470.

See also *State v. Moulton*, 48 N. H. 485; *Parson v. People*, 21 Mich. 509; *Griffin v. State*, 32 Tex. 164. [Letters from a defendant to his wife after being delivered by her to a witness for the prosecution are not privileged but are admissible against him. *State v. Buffington*, 20 Kan. 599.] A husband cannot, in a collateral proceeding give testimony which directly charges his wife with an offence in its nature indictable, although the wife has already been tried and acquitted of such offence. *State v. Wilson*, 2 Vr. 77. In collateral proceedings, husband and wife may testify to facts tending to criminate. *Commonwealth v. Reid*, 1 Campb. 182. S.

² *Commonwealth v. Griffin*, 110 Mass. 181. The law guards the marital confidence of silence as well as that of communication. A husband cannot, therefore, testify that his wife delayed to complain to him of an assault made on her. *Goodwin v. State*, 60 Ga. 509. In Pennsylvania the acts allowing a party defendant to testify on his own behalf, do not render his wife a competent witness. *Gibson v. Commonwealth*, 87 Pa. St. 253. See *Donnelly v. State*, 78 Ala. 453. By North Carolina code a husband or wife are competent witnesses for each other, but not against each other. *State v. Harbison*, 94 N. C. 885.

Alvanley.¹ If she might be a witness, his lordship observed, in a civil proceeding, she might equally be so in a criminal proceeding; and it could never be endured that the confidence which the law had created *126] *whilst the parties remained in the most intimate of all relations, should be broken whenever by the misconduct of one party the relation has been dissolved. *Monroe v. Twisleton*, Peake Ev. App. xci. 5th ed. Upon the authority of this case, Best, C. J., rejected the testimony of a widow called to prove a conversation between herself and her late husband. *Doker v. Hasker*, Ry. & M., N. P. C. 198. In *Beveridge v. Minter*, 1 C. & P. 364, 12 E. C. L., Lord Tenterden, C. J., received the evidence; but in *O'Connor v. Majoribanks*, 4 M. & G. 435, 42 E. C. L., the Court of Common Pleas held, that it was the sounder and better rule to exclude the testimony of each respecting the other in *all cases*, according to the law laid down by Lord Alvanley in *Monroe v. Twisleton*.² The above cases must now be read subject to the Married Women's Property Act, *infra*, and in matters of divorce 32 & 33 Vict. c. 68.

Only extends to lawful husband and wife.—It is only where there has been a valid marriage that the parties are excluded from giving evidence for or against each other. Therefore, on an indictment for bigamy, *after proof of the first marriage*, the second wife is a competent witness against the husband, for the marriage is void. *B. N. P.* 287; *Bac. Ab. Ev.* 1; 1 *East*, P. C. 469. See p. 129. So where a woman had married the plaintiff, and lived with him as his wife during the time of the transactions to which she was called to speak, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead; *Patteson, J.*, held that there was no objection to her giving evidence for the defendant. *Wells v. Fisher*, 1 *Moo. & R.* 99;

¹ See *Owen v. State*, 78 *Ala.* 425.

² *State v. J. N. B.*, 1 *Tyl* 36; *State v. Phelps*, 2 *Id.* 374. A widow is not permitted to testify to declarations made by her husband during coverture, to contradict and impeach the testimony given by him on a former trial between the parties. *Egdell v. Bennett et al.*, 7 *Vt.* 554. [See *Roach v. State*, 41 *Tex.* 261.] She is, however, a competent witness as to facts which happened during coverture, although it would not have been competent for her husband to have testified to them if living. *Egdell v. Bennett et al.*, 7 *Vt.* 554; *Coffin v. Jones*, 13 *Pick.* 441. The widow is not competent, after the death of her husband, to make any disclosure in relation to him, which implies a violation of the confidence reposed in her as a wife. *McGee v. Maloney*, 1 *B. Mon.* 225. [Thus she may testify as to statements made by her husband to others, but not as to statements made by her husband to herself. *Griffin v. Smith*, 45 *Ind.* 366. She is a competent witness to prove the dying declarations of her husband. *State v. Ryan*, 30 *La. An. Pt. II.* 1176.] A widow is competent to testify against the administrator of her deceased husband in respect to any facts which she did not learn from the latter. *Babcock v. Booth*, 2 *Hill*, 181. In an action for *crim. con.* with the plaintiff's wife, held, that after a divorce *a vinculo matrimonii*, she was a competent witness for the husband to prove the charge. But a wife is generally incompetent, even after divorce, to testify *against* the husband as to facts occurring during the continuance of the marriage, and which might affect the husband either in his pecuniary interest or character. Otherwise, *semble* as to facts occurring after divorce. In case of bastardy involving the adultery of the wife, she is incompetent to prove non-access of her husband; but from necessity she is admitted to prove the criminal intercourse. *Ratcliff v. Wales*, 1 *Hill*, 68. *S.*

5 C. & P. 12, 24 E. C. L. Of course, therefore, a woman who co-habits with a man as his wife, but is not so in fact, is a competent witness for or against him. *Batthews v. Galindo*, 4 Bingh. 610, 13 E. C. L.¹ See also *Reg. v. Young*, 5 Cox, C. C. 296; *Reg. v. Chadwicke*, 11 Q. B. 173, 63 E. C. L.; *Reg. v. Blackburn*, 6 Cox, C. C. 333.

Where other persons are indicted with husband or wife. Where several persons are indicted together, an attempt has sometimes been made to call the wife of one prisoner as evidence for or against another. In very few cases has this been allowed to be done.² In *R. v. Smith*, 1 Moo. C. C. 289, three prisoners were indicted for a burglary. One of the prisoners, Draper, set up an *alibi*, and called Smith's wife in support of it, but Littledale, J., refused to let her be examined, saying that the evidence of the prosecution would be thereby weakened altogether, and that so the witness's husband would be

¹ The presumption of marriage arising from the fact of co-habitation is not such as to render the woman an incompetent witness, on the man's trial for crime. *Hill v. State*, 41 Ga. 484; *Dennis v. Crittenden*, 42 N. Y. 542. The fact that a man and woman have lived in illicit co-habitation does not render the one incompetent as a witness for or against the other. *Flanigen v. State*, 25 Ark. 92. [*Rickerstricker v. State*, 31 Ark. 207; *Mann v. State*, 44 Tex. 642.] On the trial of an indictment for bigamy, the second wife, it seems, is a witness either for or against the prisoner. *State v. Patterson*, 2 Ired. 346. After a divorce *a vinculo*, the husband is competent to prove the marriage on an indictment against another for adultery with the wife before divorce. *State v. Dudley*, 7 Wis. 664. S.

² The wife of one of several defendants jointly indicted and on trial for murder, is not a competent witness for the others, to show that there was no conspiracy on their part to do any act connected with the murder of the deceased. *Mask v. State*, 32 Miss. 405. The wife of one of several defendants jointly indicted and tried together, is an incompetent witness for the others. *Commonwealth v. Robinson*, 1 Gray, 555. It is not universally a rule to exclude the wife of one defendant as a competent witness for the other, when the trial is separate. *Cornelius v. Commonwealth*, 3 Metc. (Ky.) 481. The wife of one jointly indicted is a competent witness for those associated with him in the indictment, if tried separately. *Thompson v. Commonwealth*, 1 Metc. (Ky.) 13. Two persons were jointly indicted for murder; one as principal, the other as aiding and abetting. They were separately tried. The wife of the second was offered as a witness for the first: she was held competent. *Workman v. State*, 4 Sneed, 425. Where trials on an indictment are separate the wife may testify against any one other than her husband; except in cases where the acquittal of one defendant works the acquittal of the other. *United States v. Addate*, 6 Blatch. 76. [*Fincher v. State*, 58 Ala. 215; *Powell v. State*, 58 Ala. 362. The State may try the prisoners separately for this very purpose. *Whitlow v. State*, 74 Ga. 819.] A wife is a competent witness for a person who is indicted jointly with her husband for the commission of a robbery when he is tried separately. *State v. Burnside*, 37 Mo. 343. [The prisoners waive this right by electing to be tried together. *Trowbridge v. State*, 74 Ga. 431. She may also be a witness against a co-defendant of her husband, after the indictment has been dismissed as to her husband. *Ray v. Commonwealth*, 12 Bush, (Ky.) 397; but not before. *Dill v. State*, 1 Tex. App. 278.] The wife of one of two co-defendants in a criminal prosecution may be examined as a witness for the other under the statute of 1861. *Morrissey v. People*, 11 Mich. 327. Upon the trial of an indictment for larceny, the wife of one of the defendants is an incompetent witness. *State v. McGrew*, 13 Rich. (Law), 316. The wife of an accessory to a battery is a competent witness for the principal. *State v. Mooney*, 64 N. C. 54. On the trial of a man for adultery the husband of his alleged paramour is not a competent witness for the prosecution. *Commonwealth v. Gordon*, 2 Brewst. 569. S. When both are on trial together, *Birge v. State*, 78 Ala. 435. *Contra*, *Morrill v. State*, 5 Tex. App. 447.

benefited. The question was reserved, and all the judges, except Graham, B., and Littledale, J. (who seems to have changed his opinion), thought the evidence rightly rejected. Four years afterwards, the case of *R. v. Hood*, 1 Moo. C. C. 281, was reserved. Under what precise circumstances the evidence was tendered does not appear, but the person who was tendered was the wife of a man who, though implicated in the offence, was not included in the indictment. But this distinction seems to have been overlooked, and the court refused to allow the point to be argued, saying that it was concluded by *R. v. Smith*, *supra*. So where upon an indictment against Webb and three other prisoners for sheep-stealing, the counsel for the prosecution proposed to call the wife of Webb to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to *127] *cause the acquittal or conviction of the other prisoners that the wife of one prisoner was incompetent to give evidence for or against the other prisoners, Bolland, B., held that the witness was incompetent. *R. v. Webb*, Glouc. Spr. Ass. 1830, 3 Russ. Cri. 622, 5th ed. In *R. v. Sills*, 1 C. & K. 494, 12 E. C. L., where A. and B. were indicted for burglary, and a part of the stolen property was found in the house of each of the prisoners, Tindal, C. J., allowed the wife of A. to be called on behalf of B. to prove that she took to B.'s house the property which was found there. But it seems very difficult to reconcile this decision with that of *R. v. Smith*, which was not referred to: indeed, the matter was not at all discussed. In *R. v. Thompson*, L. R. 1 C. C. R. 377; 41 L. J. M. 112, three prisoners were on their trial, two for larceny and one for receiving; and it was held that the wife of one of the two could not be called to give evidence for the one charged with receiving, although the charge against him was contained in a separate count. By far the greater preponderance of authority is, therefore, in favor of the proposition, that in no such case, where the husband is on his trial, can the wife be called as a witness, and *vice versa*.¹ See also *post*, p. 132.

Where husband or wife is not indicted, but implicated. Where the guilt of the husband or wife is not the subject of inquiry, though they may have been implicated in the transaction, then the question assumes a different aspect, and a different class of considerations is applicable. The witness, in this case, is not incompetent, and all that he or she can do is to refuse to answer certain questions. There is only one case in which the witness was held in such a case to be not competent, that of *R. v. Cliviger*, 2 T. R. 938, but this is now no

¹ *Commonwealth v. Eastland*, 1 Mass. 15. That the wife of one is a material witness for the other, is a sufficient ground for a separate trial. *Id.* *Case of Shaw et al.*, 1 Rog. Rec. 177. See *People v. Colburn*, 1 Wheel. C. C. 479; *State v. Anthony*, 1 McC. 285. Whether the trial be joint or separate, one defendant in an indictment cannot, until finally discharged, be a witness for another, and whenever the wife of one is not permitted to testify for the others on a joint trial, she will not be received for them, although her husband be not then on trial. *State v. Smith*, 2 Ired. Law, 402, 8.

longer law.¹ To what protection the husband or wife is entitled will be found discussed at p. 153.

In cases of treason. Whether or not the wife is a competent witness against her husband on a charge of treason appears to be doubted. In *R. v. Grigg*, T. Raym. 1, which was an indictment for bigamy, it is said *obiter*, that a wife could not be a witness against her husband *except in treason*; but, on the other hand, it has been asserted that a wife is not bound, in case of high treason, to discover her husband's treason; Brownl. Rep. 47; and there are many authorities to the same effect which appear to settle the point. 1 Hale, P. C. 301; Hawk. P. C. b. 2, c. 46, s. 182; Bac. Ab. Evid. (A. 1). See 2 Stark. Ev. 554, 3rd ed.; 3 Russ. Cri. 626, 5th ed.; 1 Phill. Ev. 72, 10th ed.; Best, Ev. 229.

Cases of personal violence. It is quite clear that a wife is a competent witness against her husband, in respect of any charge which affects her liberty or person.² *Per* Hullock, B., *R. v. Wakefield*, 2 Lewin, C. C. 1,279; 1 Deac. Dig. C. C. 4; 3 Russ. Cri. 625, 5th ed. Thus, in *R. v. Lord Audley*, who was tried as a principal in the second degree, for a rape upon his own wife; the judges resolved that though, in a civil case, the wife was not a competent witness, yet that in a criminal case of this nature, being the party grieved, upon whom the crime is committed, she is to be admitted as a witness against her husband. 3 How. St. Tr. 402; 1 Hale, P. C. 301. So on an indictment against the husband for an assault upon the wife. *R. v. Azire*, 1 Str. 633; B. N. P. 287. So a wife is always permitted to swear the peace against her *husband, and her affidavit has been permitted to be read, on an application to the Court of King's Bench, for an information [*128 against the husband, for an attempt to take her away by force, after

¹ A wife cannot testify in matters tending to criminate her husband, who is jointly indicted with another person, but is not brought to trial. *State v. Bradley*, 9 Rich. Law, 169. The testimony of a wife, the only tendency of which is to discredit her husband, is not admissible. *Keaton v. McGwier*, 24 Ga. 217. S.

She is competent to contradict her husband when a witness for the State in a charge of assault against himself. *State v. Parrott*, 79 N. C. 615.

² *Trever's Case*, 1 Rog. Rec. 107; *Resp. v. Hevice et al.*, 2 Y. 114; *Soulis's Case*, 5 Greenl. 407; *Wiggin's Case*, 2 Rog. Rec. 156; *State v. Boyd*, 2 Hill, 288. [But see *Wheeler v. Wheeler*, 47 Vt. 637. The violence must threaten lasting injury or the testimony is not competent. *State v. Davidson*, 77 N. C. 522.] A wife can be a witness against her husband in a criminal proceeding, only when he is charged with committing or threatening an injury to her person. Upon an indictment against her husband for using criminal means, subornation of perjury, to wrong her in a judicial proceeding, she cannot be a witness against him. *People v. Carpenter*, 9 Barb. 580. The oath of a married woman will not sustain a warrant for the arrest of her husband for adultery; nor can a husband be a witness in a case against his wife for adultery. *Commonwealth v. Jailer*, 1 Gr. Cases, 218; *State v. Berlin*, 42 Mo. 572. In the trial of a complaint against a man for an assault and battery upon his wife, she is a competent witness in his favor. *Commonwealth v. Murphy*, 4 Allen, 491. Wife is competent against husband on charge of procuring a miscarriage. *State v. Dyer*, 59 Me. 303. As to the effect of the statute on husband and wife as witnesses: *Steen v. State*, 20 O. St. 333. S. *Schultz v. State*, 32 Ohio St. 276.

Both husband and wife are competent witnesses in an indictment for an offence committed against the other, and may be compelled to testify. *Bramlette v. State*, 21 Tex. App. 611.

articles of separation. *Lady Lawley's case*, B. N. P. 287. Upon an indictment under the repealed statute, 3 Hen. 7, c. 2, for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband, *de facto*. *R. v. Fulwood*, Cro. Car. 488; *R. v. Brown*, 1 Vent. 243; *R. v. Naagen Swenden*, 14 How. St. Tr. 559, 575. And she was consequently a witness for him. *R. v. Perry*, *coram* Gibbs, C. J., 1794; Hawk. P. C. b. 2, c. 46, s. 79, cited Ry. & Moo. N. P. C. 353. But a doubt has been entertained, whether, if the woman afterwards assent to the marriage, she is capable of being a witness. In *R. v. Brown* (*supra*), it is said by Lord Hale, that most were of opinion that, had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband. 1 Hale, P. C. 302. But Mr. Justice Blackstone, in his Commentaries, has expressed a contrary opinion. 4 Com. 209. And the arguments of Mr. East, on the same side, appear to carry great weight with them. 1 East, P. C. 454. In a case before Mr. Baron Hullock, where the defendants were charged, in one count, with a conspiracy to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and in another count, with conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; the learned judge was of opinion, that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of necessity, although there was no evidence to support that part of the indictment which charged force; and also on the ground that the latter defendant, by his own criminal act, could not exclude such evidence against himself. *R. v. Wakefield*, 2 Lewin, C. C. 1 and 279; 2 Deac. Dig. C. C. 4; 3 Russ. Cri. 624, 5th ed.; 2 Stark. Ev. 552 (n), 3rd ed.

Upon an indictment under Lord Ellenborough's Act, against a man for shooting at his wife, the latter was admitted as a witness by Mr. Baron Garrow, after consulting Holroyd, J., upon the ground of the necessity of the case; and Mr. Justice Holroyd sent Mr. Baron Garrow the case of *R. v. Jagger*, 1 East, P. C. 455, York Assizes, 1797, where the husband attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband, and Mr. Justice Rooke afterwards delivered the opinion of the twelve judges, that the evidence was rightly admitted. Mr. Justice Holroyd, however, said, that he thought the wife could only be admitted to prove facts which could not be proved by any other witness. 3 Russ, 5th ed. 625. Upon the same principle that the evidence of the wife if living, would be received to prove a case of personal violence, her dying declarations are admissible in case of murder by her husband.¹ *R. v. Woodcock*, 1 Leach, 500; *R. v. John*, Id. 504 (n); 1 East, P. C. 357; 3 Russ. Cri. 624, 5th ed. And in similar cases of personal violence,

¹ *Pennsylvania v. Stoops*, Addis. 332. S.

the examinations of the party (husband or wife), murdered, taken before a magistrate pursuant to the statute, would, as it seems, be admissible against the husband or wife, where the evidence of the husband or wife, if living, would have been admissible. See *M'Nally*, *Ev. 175. Upon the hearing of an information for neglecting to maintain a wife whereby she becomes chargeable to the parish, the wife is not a competent witness against her husband, for such neglect is not a personal injury to the wife, but an offence against the parish; nor is there any necessity for calling the wife, as such neglect might be proved by other persons. *Reeve v. Wood*, 34 L. J., M. C. 15.

On the same principle the husband would be admissible as a witness against the wife in cases of personal injury to him.¹

In cases of bigamy. As has already been said (p. 126), after proof of the first marriage, no reliance can be placed on the second marriage as creating the relation of husband and wife, and, therefore, the parties to that marriage become competent witnesses for or against each other. It has been contended by two writers of authority (*Alison's Pr. Cr. Law*, 463; *Best, Ev.* 228) that the evidence should be admitted in those cases on the ground of the personal injury. But that opinion has not yet received the sanction of authority.

Exceptions by statute to incompetency of husband and wife.²

In recent statutable offences the tendency of legislation has been to relax the rigidity of the common law rule by which husbands and wives are incompetent witnesses for or against each other in criminal proceedings. An exception to the rule is made under s. 11 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), where upon the hearing and determining of any indictment or information under sections 4, 5, and 6 (see *post* tit. Conspiracy), the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses. Under 40 Vict. c. 14, on the trial of any indictment for the non-repair of any public highway or bridge, or for any nuisance to any public highway, river, or bridge, or for any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses, and compellable to give evidence.

The combined effect of s. 12 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and s. 16, is not easily to be explained. It is said in section 12 that the husband or wife are competent to give evidence against each other, but not, as it seems, for each

¹ *Whipp v. State*, 34 O. St. 87.

² See under N. Y. statute against disorderly persons. *People v. Commissioners Public Charities*, 9 Hun. (N. Y.) 212. A statute which is restricted to the restoration of competency does not withdraw from the witness the right to claim the privilege arising from confidential relations. *State v. Bernard*, 45 Ia. 234.

other. With regard to section 12, as that section only contemplates a prosecution by the wife against the husband, and enacts 'that the husband may give evidence against the wife, it seems impossible to contend that the husband, although a prisoner, may be called as a witness against her (although not for her). The calling of the husband-prisoner as a witness would appear to be so strange an anomaly as to require very clear language to support it. With regard to section 16, it is most difficult to say what the words "shall in like manner be liable to criminal proceedings" mean. But it has been decided that where a husband prosecuted his wife and a male prisoner for larceny, the evidence of the husband was improperly received, and the conviction against the wife and against the male prisoner was quashed. *R. v. Brittleton*, C. C. R., March 3rd, 1884; Lord Coleridge, C. J.; Hawkins, Lopes, Stephen, Matthew, JJ. (Stephen, J., dub.) "*R. v. Kain*, 15 Cox, C. C. 388." But now by the Act just passed, 47 & 48 Vict. c. 14, s. 1, "In any such criminal proceeding against a husband or wife as is authorized by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence."

In any proceeding against any person for a crime under the *Explosive Substances Act, 1883 (46 Vict. c. 3), such person and
 *130] his wife, or husband, as the case may be, may, by section 4 (2), if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case. And in any prosecution under the Corrupt Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), the person prosecuted may, by section 53 (2), and the husband or wife of such person, if he or she thinks fit, be examined as an ordinary witness in the case.

Incompetency in other cases. The only other case of incompetency is that of a grand juror, who has sometimes been rejected on account of the oath of secrecy which he takes before the inquiry. But even as to him the case has been considered doubtful. 1 Phill. Ev. 140, 10th ed. Indeed, Lord Kenyon allowed a grand jurymen to be called to prove who was the prosecutor of an indictment, being of opinion that it was a fact, the disclosure of which did not infringe upon his oath. *Sykes v. Dunbar*, 2 Selw. N. P. 1004. The court of King's Bench refused to receive an affidavit from a grand jurymen, as to the number of grand jurors who concurred in finding the bill. *R. v. Marsh*, 6 A. & E. 236, 33 E. C. L. So where a grand jury returned an indictment containing ten counts, indorsed, "a true bill on both counts," and the prisoner pleaded to the whole ten counts; Pattenon, J. (the grand jurors having been discharged), would not allow one of them to be called as a witness to explain their finding. *R. v. Cooke*, 8 C. & P. 582, 34 E. C. L. It is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the judges appointed to try him. 2 Hawk, P. C. c. 46, s. 17; Bac. Ab. Evid. (A. 2). In *R. v. Hacker*, two of the persons in the commis-

sion for the trial came off the bench, and were sworn, and gave evidence, and did not go up to the bench again during his trial. Kel. 12. Sid. 153.

A juror may give evidence of any fact material to be communicated in the course of a trial, but of course he must be sworn. 3 Com. 735.¹

It may be here mentioned that the 14 & 15 Vict. c. 99, s. 3, does not render any person, who in any criminal proceeding is charged with the commission of an indictable offence, or any offence punishable on summary conviction, competent to give evidence for or against himself or herself.² As to what is a criminal proceeding, see *Parker v. Green*,

¹ A grand juror on the trial of an indictment may be compelled to disclose what was given in evidence by a witness before the grand jury. *State v. Broughton*, 7 Ired. 96. [As to contradict a witness, called by the prisoner, who testifies differently to what he did before the grand jury. *State v. Benner*, 64 Me. 267; *Gordon v. Commonwealth*, 92 Pa. St. 216. A member of a grand jury is not incompetent as a witness. *State v. McDonald*, 73 N. C. 346; *Bressler v. People*, 117 Ill. 422. See *Commonwealth v. Mead*, 12 Gray, (Mass.) 167; *Gordon v. Commonwealth*, 92 Pa. St. 216; *Little v. Commonwealth*, 25 Gratt, (Va.) 921; *State v. Wood*, 53 N. H. 484. See *infra*, page *157 note.] A member of the grand jury which found an indictment is a competent witness on the trial to prove that a certain person did not testify before the grand jury. *Commonwealth v. Hill*, 11 Cush. 137; [or that a witness told a different story to the grand jury; but the witness's attention must first be called to the contradiction. *Hoge v. People*, 117 Ill. 35.] A juror in a criminal case may be examined as a witness. *Howser v. Commonwealth*, 51 Pa. St. 332. S. It is the duty of the juror to state under oath whatever he knows of the case. *Wharton v. State*, 45 Tex. 2.

² The law is different in most of the United States under statutes authorizing a defendant to testify on his own behalf. See the statutes of the various States. In Michigan the defendant's statement is not made under oath. It is optional and its weight is for the jury. *DeFoe v. People*, 22 Mich. 224; *People v. Jones*, 24 Mich. 215; *People v. Arnold*, 40 Mich. 710. In Florida the defendant may, with leave of court, make a statement under oath the weight of which is for the jury. *Barber v. State*, 13 Fla. 675. He does not, when he makes the statement, become a witness and subject to the rules governing the examination of a witness. *Miller v. State*, 15 Fla. 577. In Georgia his counsel cannot ask him questions as a matter of right though the court may give leave to do so. *Brown v. State*, 58 Ga. 212. Under Iowa code one held in a preliminary examination is not a competent witness on his own behalf. *State v. Darrington*, 47 Iowa, 518. In Pennsylvania his right to testify does not enable his wife to do so also. *Gibson v. Commonwealth*, 87 Pa. St. 253. In Alabama the statement of the defendant though not under oath is evidence and is to be weighed by the jury. *Williams v. State*, 74 Ala. 18. He may be cross-examined but not as to other offences. *Clarke v. State*, 78 Ala. 474. When by statute he does testify the same rules of evidence apply to him as to any other witness. *State v. Clinton*, 67 Mo. 380. His credibility is for the jury. *Pridgen v. Walker*, 40 Tex. 135; *People v. Rodondo*, 44 Cal. 538; *People v. Russell*, 46 Cal. 121. He cannot be cross-examined as to matters outside the statement made by him. *Gale v. People*, 26 Mich. 157; *People v. O'Brien*, 66 Cal. 602. Where he testifies on his own behalf, he waives his privilege not to criminate himself. *Commonwealth v. Nichols*, 114 Mass. 285; *Commonwealth v. Tolliver*, 119 Mass. 312; *State v. Wentworth*, 65 Me. 234; *Roddy v. Finnegan*, 43 Md. 490; *State v. Fay*, 43 Iowa, 651; *State v. Huff*, 11 Nev. 17. He can be examined as to his motives and intent. *Kerrains v. People*, 60 N. Y. 221. His character for truthfulness may be attacked. *Commonwealth v. Duckwork*, 2 County Ct. Rep. (Pa.) 443. He may testify on his own behalf what his intentions were. *Greer v. State*, 53 Ind. 420. *White v. State*, Id. 595. *Contra*, *Stewart v. State*, 78 Ala. 436. To impeach him evidence of his general moral character is admissible. *State v. Cox*, 67 Mo. 392; *State v. Palmer*, 88 Mo. 568. It is not proper to ask him whether he has been tried for other offences, but it is not ground for reversal where he answers that he was acquitted. *People v. Ogle*, 4 N. Y. Crim. Rep. 349. On the credibility of the defendant as a witness and the right of the court to comment thereon. See *Pratt v. State*, 56 Ind. 179; *Veatch v. State*, Id. 584; *Bird v. State*, 107 Ind. 154; *Wharton's*

31 L. J., M. C. 133; 2 B. & S. 209, 110 E. C. L.; and Att.-Gen. v. Radloff, 10 Ex. 84. Some exceptions to the above section have however been recently made; the first is in the case of any person indicted under the Conspiracy Act, 38 & 39 Vict. c. 86, s. 10, *supra*; and see *post*, tit. Conspiracy; another exception is in the case of any person charged with sending, attempting to send, or taking a ship to sea in such unseaworthy state, that the life of any person would be likely to be endangered, 39 & 40 Vict. c. 80, s. 4. See *post*, tit. Ships. Another exception is in the case of a person prosecuted under the Corrupt Practices Prevention Act, 1883, *supra*; and another in the case of a person prosecuted under the Explosive Substances Act, 1883, *supra*.

Accomplice—always admissible. Notwithstanding the common law rule which formerly prevailed that witnesses who were interested in the inquiry were not admissible, an exception was always made in the case of an accomplice who was willing to give evidence; and this exception has been stated to be founded on necessity, since, if *131] *accomplices were not admitted, it would frequently be impossible to find evidence to convict the greatest offenders.¹ Hawk. P. C. b. 2, c. 46, s. 94. It is not a matter of course to admit an accomplice to give evidence on the trial, even though his testimony has been received by the committing magistrates; but an application to

Crim. Evid., § 429 and notes; Greer v. State, 53 Ind. 420; People v. Morrow, 60 Cal. 142; Minich v. People, 8 Col. 440. The court need not instruct the jury, unless specially requested to do so, that the fact that the defendant did not testify should not prejudice him. State v. Stevens, 67 Iowa, 557. It is error for the judge to charge that the prisoner's statement is to be received with caution. Andrews v. State, 21 Fla. 598. *Contra*, People v. Cronin, 34 Cal. 191; Territory v. Romine, 2 New Mex. 114. In Maine counsel for the State is forbidden to comment on the fact that the prisoner did not take the stand. State v. Banks, 78 Me. 49. He is not disqualified because of want of religious belief. Commonwealth v. Kauffman, 1 County Ct. Rep. (Pa.) 410.

¹ Brown v. Commonwealth, 2 Leigh, 769. At the discretion of the court, upon motion of the public prosecuting officer. People v. Whipple, 9 Cow. 707. [Lindsay v. People, 63 N. Y. 143; Wight v. Rindskoff, 43 Wis. 344. There is no restriction in civil actions. Kalckhoff v. Zoehrlant, 43 Wis. 373.] See Kinchelov v. State, 5 Humph. 9. An accomplice is a competent witness, and the value of his testimony is for the jury. Gray v. People, 26 Ill. 344. [Solander v. People, 2 Col. 48; State v. Crowley, 33 La. An. 782; State v. Dietz, 67 Ia. 220. Whether the witness is an accomplice is to be proved inferentially, the question being one of fact for the jury. Commonwealth v. Ford, 111 Mass. 394; Commonwealth v. Glover, Id. 395. It is error for the court to charge conclusively on this point. Moses v. State, 58 Ala. 117; Rafferty v. People, 72 Ill. 37.] One who was jointly indicted with the defendant, but as to whom a *nolle prosequi* has been entered, is a competent witness for the prosecution. State v. Clamp, 16 Mo. 395. See United States v. Harries, 2 Bond, 311; United States v. Smith, Id. 323; United States v. One Distillery, Id. 399; Parsons v. State, 43 Ga. 197; Lee v. State, 21 O. St. 151; Lopez v. State, 34 Tex. 133; Phillips v. State, 34 Ga. 502; Sumpter v. State, 11 Fla. 247; McKenzie v. State, 24 Ark. 636; People v. Garnett, 29 Cal. 622; State v. Schlager, 19 Ia. 169; State v. Cook, 20 La. An. 145; Foster v. People, 18 Mich. 266; Cross v. People, 47 Ill. 152; State v. Potter, 42 Vt. 495; People v. Haynes, 55 Barb. 450; 38 How. Pr. 369. S.

The Texan code has not altered the common law rule, except to forbid an indicted accomplice from testifying in behalf of the others previous to his own acquittal. Meyers v. State, 3 Tex. App. 8. In cases where corroboration is required, an accomplice is competent as the corroborating witness. People v. Powell, 4 N. Y. Crim. Rep. 585.

the court for the purpose must be made. 1 Phill. Ev. 91, 10th ed. The court usually considers, not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers against whom the evidence of the accomplice was required; Gurney, B., refused to permit one of the principals to become a witness. *R. v. Mellor*, Staff. Sum. Ass. 1833. So in *R. v. Saunders*, Worc. Spr. Ass. 1842, on a motion to admit an accomplice, Patteson, J., said, "I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do." In *R. v. Salt*, Staff. Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness; 3 Russ. Cri. 602, 5th ed. (j); and again in *R. v. Sparks*, 1 F. & F. 388, where the counsel for the prosecution applied for leave to call an accomplice who had pleaded guilty, Hill, J., refused to permit it until the other evidence had been given in order to see whether it was sufficient to corroborate that of the accomplice, *infra*, 132.

Accomplice—practice in calling. It makes no difference whether the accomplice has been convicted or not, or whether he be joined in the same indictment with the prisoner to be tried or not; provided he be not put upon his trial at the same time. Hawk. P. C. b. 2, c. 46, s. 90. Where A., B., C., and D. were indicted together, after plea, and before they were given in charge to the jury, Williams, J., allowed D. to be removed from the dock and examined as a witness against his associates; *R. v. Gerber*, Temp. & M. 647. See, also, *Winsor v. R.*, L. R., 1 Q. B. 390; 35 L. J., M. C. 161.

The practice, where the testimony of an accomplice is required to prove the case before the grand jury, and he is in custody, is for the counsel for the prosecution to move that he be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that the testimony is essential. 2 Stark. Ev. 12, 3rd ed. Where the accomplice has been joined in the indictment, and, before the case comes on, it appears that his evidence will be required, the usual practice is, before opening the case, to apply to have the accomplice acquitted. *R. v. Rowland*, Ry. & Moo. N. P. C. 401. See, also, a remark of Cockburn, C. J., in *Winsor v. Reg.*; *supra*, approving of this course, where the prosecution call the witness, although, as pointed out by Lord Coleridge, in *R. v. Bradlaugh*, *infra*, he did not lay it down as a proposition of law that the accomplice could not be called without being first acquitted. Where the case has proceeded against all the prisoners but no evidence appears against one of

them, the court will, in its discretion; upon the application of the prosecutor, order that one to be acquitted for the purpose of giving *evidence against the rest. *R. v. Fraser*, 1 M'Nally, 56. *132] Where defendants are jointly indicted and jointly tried, they cannot be called for or against each other. *R. v. Payne*, L. R. 1 C. C. R. 349; 41 L. J., M. C. 65. Nor can the wife of one of them be called to give evidence for or against her husband, or one of the other prisoners. *R. v. Thompson*, *ante*, p. 127.

Accomplice—when competent for prisoner. It is quite clear that an accomplice is a competent witness for the prisoner, in conjunction with whom he himself committed the crime. *R. v. Balmore*, 1 Hale, P. C. 305. But if he is charged in the same indictment, and is put upon his trial, he cannot be called. If he is charged in the same indictment, but not given in charge to the jury, and his trial is postponed, he may be called (without being acquitted) either for the crown or the defence; but, as stated, *supra*, if called for the crown, the better course is to take an acquittal; and if called for the defence, no acquittal need be taken. *R. v. Bradlaugh*, 15 Cox, C. C. 217; *R. v. Payne*, *supra*.¹

Accomplice—promise of pardon. Although Lord Hale thought that if a man had a promise of pardon if he gave evidence against one of his confederates, this disabled his testimony, 2 Hale, P. C. 280; yet it was fully settled, before the statutes were passed which removed the disabilities of witnesses on the ground of interest, that such a promise, however it might affect the credibility of the witness, would not destroy his competency. *R. v. Tonge*, Kelynge; 1 Phill. Ev. 90, 10th ed.

¹ *United States v. Heany*, 4 Wash. C. C. 428. Defendants jointly indicted for a riot, cannot be witnesses for or against each other, until they are discharged from the prosecution or convicted. *State v. Mooney et al.*, 1 Yerg. 431. [*Contra*, as to being a witness for the State, although awaiting trial. *Carroll v. State*, 5 Neb. 31; or under remand, having pleaded guilty. *Lee v. State*, 51 Miss. 566.] The testimony of an accomplice who has been joined in the same indictment with the principal, is admissible for defendant only when he has been acquitted, or when the defendants are tried severally. *Armistead v. State*, 18 Ga. 704. One of several jointly indicted for the same offence cannot be a witness for his co-defendants, until he has ceased to be a party, either by an entry of *nolle prosequi* as to him, a verdict of acquittal, or a judgment against him as guilty upon his confession or otherwise. *State v. Young*, 39 N. H. 283; *State v. Nash*, 7 Clark, 347. One of several jointly indicted is not competent for the other. *State v. Edwards*, 19 Mo. 674; *People v. Donnelly*, 2 Park. C. R. 182; *State v. Dumphey*, 4 Minn. 438. [Even when tried separately. *Staup v. Commonwealth*, 74 Pa. St. 458; *Kehoe v. Commonwealth*, 85 Pa. St. 127; *Rutter v. State*, 4 Tex. App. 57; *Booth v. State*, Id. 202.] Where two persons indicted jointly for a felony, claim separate trials, the one tried first is not entitled to have the other examined as a witness in his behalf. *McIntyre v. People*, 5 Seld. 38; *contra*, *Lazier v. Commonwealth*, 10 Gratt. 708. When an accomplice or co-defendant in a criminal proceeding elects to be tried separately, he is a competent witness for the other. *People v. Labra*, 5 Cal. 183; *State v. Stotts*, 26 Mo. 307; *Marshall v. State*, 8 Ind. 498; *Sloan v. State*, 9 Id. 565; *Hunt v. State*, 10 Id. 69; *Moss v. State*, 17 Ark. 327. See *State v. Drawdy*, 14 Rich. (Law) 87; *McKenzie v. State*, 24 Ark. 636; *Brown v. State*, Id. 620; *State v. Jones*, 51 Me. 125; *People v. Newberry*, 20 Cal. 439; *George v. State*, 39 Miss. 570. S. The common law rule on the point is not altered by the Maryland Evidence Act of 1864. *Davis v. State*, 38 Md. 15.

Accomplice—corroboration of. The state of the law as to the corroboration of accomplices is somewhat peculiar. It has been repeatedly laid down that a conviction on the testimony of an accomplice uncorroborated is legal. The point was considered by the twelve judges, and so decided in *R. v. Attwood*, 1 Lea. 464; and again, in *R. v. Durham*, Id. 478. And that the rule is so has also been acknowledged by Lord Hale, 1 Hale, P. C. 304, 305; Lord Ellenborough, *R. v. Jones*, 2 Campb. 132; Lord Denman, *R. v. Hastings*, 7 C. & P. 152, 32 E. C. L.; Alderson, B., *R. v. Wilks*, Id. 273; Gurney, J., *R. v. Jarvis*, 2 Moo. & R. 40; and lastly, by the Court of Criminal Appeal, in *R. v. Stubbs*, 25 L. J., M. C. 16. See, also, *R. v. Boyes*, 1 B. & S. 311, 101 E. C. L.¹

¹ Case of *Brown et al.*, 2 Rog. Rec. 38; *People v. Reeder*, 1 Wheel. C. C. 418; *McDowell's Case*, 5 Rog. Rec. 94. Upon the trial of an indictment, an accomplice in the commission of the offence is a competent witness for the prosecution; and the testimony of a witness thus situated will, if the jury are fully convinced of its truth, warrant the conviction of the defendant, though it be uncorroborated by other testimony. *People v. Costello*, 1 Denio, 53. But it is most proper to acquit, where the testimony of an accomplice is not corroborated in material circumstances. *Commonwealth v. Grant*, *Thatcher's C. C.* 433. Where the direct charge rests for its proof upon the testimony of accomplices, it is sufficient to convict if it be corroborated by the evidence of credible witnesses, although such evidence has only an indirect tendency to establish the commission of the particular offences charged. *People v. Davis*, 21 Wend. 309. The evidence of an accomplice is altogether for the jury, and they, if they please, may act upon it without any confirmation of his statement. *State v. Brown*, 3 Strob. 503. [*Earl v. People*, 73 Ill. 329; *White v. State*, 52 Miss. 216; *Fitzcox v. State*, Id. 923; *State v. Jones*, 64 Mo. 391. *Contra*, *Irvin v. State*, 1 Tex. App. 301.] There may be a conviction on the uncorroborated evidence of an accomplice. *Stocking v. State*, 7 Ind. 326; *Dick v. State*, 30 Miss. 593; *State v. Stebbins*, 29 Conn. 463; *State v. Watson*, 31 Mo. 361; *Steinham v. United States*, 2 Paine, C. C. 163. [*State v. Betsall*, 11 W. Va. 703.] *Contra*, *Upton v. State*, 5 Clark, 465; *State v. Howard*, 32 Vt. 330; *State v. Willis*, 9 Ia. 582. [See *Roach v. State*, 4 Tex. App. 46; *Miller v. State*, Id. 251.] The uncorroborated testimony of an accomplice should be received with great caution, and the court should always so instruct the jury; but they are not to be instructed that in point of law a conviction cannot be obtained upon such testimony. *People v. Costello*, 1 Denio, 83. As to evidence in corroboration of an accomplice. *State v. Ford*, 3 Strob. 517; *State v. Walcott*, 21 Conn. 272. [*State v. Kellerman*, 14 Kan. 135.] Evidence offered in corroboration of the testimony of an accomplice, in other respects unobjectionable is competent, although it does not go so far as to implicate the defendant. *State v. Watson*, 31 Mo. 361. [Under Iowa code the corroborating testimony may be circumstantial. *State v. Stanley*, 48 Iowa, 221.] One who purchases intoxicating liquor sold contrary to law, for the express purposes of prosecuting the seller for an unlawful sale, is not an accomplice, and is a competent witness on the trial of the seller, but the jury should be instructed to receive his evidence with the greatest caution and distrust. *Commonwealth v. Downing*, 4 Gray, 29. [*People v. Barric*, 49 Cal. 242; *State v. McKean*, 36 Ia. 343.] When the only evidence was the testimony of accomplices, the judge advised the jury to acquit, but instructed them that if upon the whole evidence they were convinced beyond a reasonable doubt of the guilt of the defendant, they should find a verdict of guilty; held, that the defendant had no ground of exception. *Commonwealth v. Price*, 10 Gray, 472. As to the necessity of corroboration: see further, *Bird v. State*, 36 Ala. 279; *Commonwealth v. Brooks*, 9 Gray, 299; *Johnson v. State*, 4 Gr. 65; *State v. Thornton*, 26 Ia. 79; *People v. Evans*, 40 N. Y. 1. [*Wyoming County v. Bardwell*, 84 Pa. St. 104; *Hester v. Commonwealth*, 85 Pa. St. 139.]

When an accomplice and his wife are witnesses for the prosecution in a criminal trial, the wife is a competent witness to prove any independent facts not sworn to by her husband, and not forming any part of his acts, although those facts fasten a guilty knowledge on the defendant. *United States v. Horn*, 5 Blatch. C. C. 102. The testimony of a feigned accomplice does not require corroboration. *People v. Farrell*, 30 Cal. 316. [*Campbell v. Commonwealth*, 84 Pa. St. 187.] Pending indictment not

But while the law is thus fully established, the practice of judges is almost invariably to advise juries not to convict upon the evidence of an accomplice who is uncorroborated, and sometimes judges, where the testimony of the accomplice is the only evidence, take upon themselves to direct an acquittal of the prisoner. Of course it is always proper for a judge in the exercise of his discretion to *advise* a jury to acquit the prisoner in any case, but it is submitted that it is not usually his province to *direct* an acquittal unless there be no legal evidence against the prisoner, which in the face of the above decisions cannot be the case if an accomplice has given evidence against him. The almost absolute terms, moreover, in which judges state it to be their practice to advise juries not to convict in such cases, leave it impossible to conceive in what case the principle so frequently acknowledged in the cases above quoted is to receive any application. And lastly, the practice, already alluded to, *ante*, p. 131, of not *133] *permitting the accomplice to be called until it appears that his evidence can be satisfactorily corroborated, can only be justified on the assumption that on his evidence, uncorroborated, a legal conviction could not be founded. Thus the law remains in that anomalous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated. As the law now stands, it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a judge would be wrong who did not advise the jury not to convict; whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a judge who did not so advise them was right.

Accomplice—nature of corroboration. Another point which arises with respect to the corroboration of accomplices, and upon which the authorities are by no means so well agreed, is as to what is the nature of the corroboration which ought to be required. We say *required*, but it is rather difficult to say by what or how the requirement is to be exacted, for by law no corroboration is required at all. See *Reg. v. Gallagher*, 15 Cox, C. C. 292. Probably the word has been used in forgetfulness of the principle we have just been discussing, and which only seems to be remembered when its existence is called in question. The practice, however, is for the present purpose much more important than the principle, and we shall, therefore, consider how far the evidence ought to be corroborated.¹

admissible to show that witness is an accomplice. *Craft v. State*, 3 Kan. 450. On the trial of an indictment for advising and procuring a pregnant woman to take a certain medicine with intent to procure her miscarriage, the female does not stand legally in the situation of an accomplice. *Dunn v. People*, 29 N. Y. 623; *Commonwealth v. Wood*, 11 Gray, 85. [*Commonwealth v. Boynton*, 116 Mass. 343.] A woman on whom abortion is practiced is to be regarded as an accomplice. *People v. Josalyin*, 39 Cal. 393. S.

Bettors at the same game are not accomplices. *Stone v. State*, 3 Tex. App. 375. A witness present at an arson, although he conceals his knowledge, unless he aids and abets, procures or participates in the crime, is not an accomplice who requires to be corroborated. *Allen v. State*, 74 Ga. 769.

¹ It is not necessary that the testimony of an accomplice should be corroborated in every material point. *Croft v. State*, 3 Kansas, 450. S.

It must be recollected that an accomplice is in most cases present at the committal of the offence ; and even if not so, he may be presumed to be on those terms of intimacy with the accused which would render his knowledge of all the circumstances attending the commission of the crime extremely probable. There may be many witnesses therefore who give testimony which agrees with that of the accomplice, but which, if it does not serve to identify the accused parties, is no corroboration of the accomplice ; the real danger being that the accomplice should relate the circumstances truly, and at the same time attribute a share in the transaction to an innocent person.

It may indeed be taken that it is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks. This was so held by Patterson, J., in *R. v. Addis*, 6 C. & P. 388, 25 E. C. L. ; and again, in *R. v. Kelsey*, 2 Lew. 45 ; by Williams, J., in *R. v. Webb*, 6 C. & P. 595, 25 E. C. L. ; by Alderson, B., in *R. v. Wilks*, 7 C. & P. 272, 32 E. C. L. ; and by Lord Abinger, C. B., in *R. v. Farlar*, 8 C. & P. 106, 34 E. C. L.¹

And in the later case of *R. v. Stubbs*, 25 L. J., M. C. 16, Parke, B., said, " My practice always has been to tell the jury not to convict the prisoner, unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner ;" and Cresswell, J., added, " You may take it for granted, that the accomplice was at the committal of the offence, and may be corroborated as to the facts ; but that has no tendency to show that the parties accused were there."

What appears to be required is, that there should be some fact deposed to independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. Thus upon an indictment for receiving a sheep knowing it to have * been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, and that the brother [*134 gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid. On the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen, and the skins were found in the place named by the accomplice. Patterson, J., held that this was sufficient : the finding of the mutton in the possession of the prisoner in itself raising an implication of guilt on his part, which the testimony of the accomplice confirmed.

What is sufficient corroboration. *Commonwealth v. Drake*, 124 Mass. 21 ; *State v. Graff*, 47 Iowa, 384 ; *Jones v. State*, 3 Tex. App. 575 ; *Gillian v. State*, 3 Tex. App. 132. Flight is evidence which will corroborate an accomplice. *Ross v. State*, 74 Ala. 532.

¹ *Wright v. State*, 43 Tex. 170 ; *Nourse v. State*, 2 Tex. App. 304 ; *Davis v. State*, Id. 588 ; *Smith v. State*, 59 Ala. 104 ; *Hoyle v. State*, 4 Tex. App. 239 ; *Jackson v. State*, Id. 292 ; *Jones v. State*, Id. 529 ; *State v. Dietz*, 67 Iowa, 220 ; *Robinson v. State*, 16 Tenn. 146 ; *People v. Ogle*, 4 N. Y. Crim. Rep. 349. But see *State v. Williamson*, 42 Conn. 261 ; *People v. Cloonan*, 50 Cal. 449.

R. v. Birkett, 8 C. & P. 732, 34 E. C. L. It is not necessary that the accomplice should be corroborated in every particular; but there must be a sufficient amount of confirmation to satisfy the jury of the truth of his story. *Reg. v. Gallagher*, 15 Cox, C. C. 292.

The point about which the opinions of judges appear to have fluctuated, is as to whether where several are indicted, and the evidence of the accomplice is confirmed as to some only and not as to others, the jury ought to be advised to acquit those against whom there is no corroboration. On the one hand it is strongly urged in a note by Mr. Starkie to the case of *R. v. Dawber*, 3 Stark. N. P. C. 34 (n), that a witness, if believed at all, must be believed *in toto*, and he cannot be considered as speaking the truth as to some of the prisoners and not as to the others. The view of Mr. Starkie is supported by the case to which the note is appended; there, on the trial of several prisoners, an accomplice who gave evidence was confirmed in his testimony with regard to some of the prisoners, but not as to the rest; Bayley, J., informed the jury that if they were satisfied by the confirmatory evidence, that the accomplice was a credible witness, they might act upon his testimony with respect to others of the defendants, though as far as his evidence affected them, he had received no confirmation: and all the defendants were convicted. But to the argument used by Mr. Starkie it may be answered, that the whole practice of requiring corroboration is founded on the supposition that there are degrees of credibility, and that an accomplice, though not absolutely incredible, is only credible when confirmed; and that he will only speak the truth in part is just as probable as that he will not speak the truth at all. And this is the view that has been taken in the majority of the cases; thus in *R. v. Wells*, M. & M. 326, where an indictment was preferred against several as principals and accessories, the case was proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal; Littledale, J., advised the jury that the case ought not to be considered as proved against the principal, and that all the prisoners ought, therefore, to be acquitted. So in *R. v. Morris*, 7 C. & P. 270, 32 E. C. L., on an indictment against A. as principal and B. as receiver, where the evidence of an accomplice was corroborated as against A., but not as against B., Alderson, B., thought that it was not sufficient; and in *R. v. Stubbs*, *supra*, Jervis, C. J., said, "there is another point to be noticed; when an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the judge to advise the jury, that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed; for the accomplice may speak truly as to all the facts of the case, and at the same time
*135] *in his evidence substitute the third person for himself in his narrative of the transaction."

Accomplice—by whom to be corroborated. The practice of requiring the evidence of an accomplice to be confirmed, appears to apply equally when two or more accomplices are produced against a prisoner. In a case where two accomplices spoke distinctly to the

prisoner, Littledale, J., told the jury, that if their statements were the only evidence, he could not advise them to convict the prisoner, adding, that it was not usual to convict on the evidence of one accomplice without confirmation, and that in his opinion it made no difference whether there were more accomplices than one. *R. v. Noakes*, 5 C. & P. 326, 24 E. C. L. *Sed qu.* In one case it was held by Mr. Justice Park, that a confirmation by the wife of an accomplice was insufficient, as the wife and the accomplice must be considered as one for this purpose. *R. v. Neale*, 7 C. & P. 168, 32 E. C. L. See also *R. v. Jellyman*, 8 C. & P. 604, 34 E. C. L., *acc.* As to which also, *quære*.¹

Accomplice—situation of an accomplice when called as a witness. Where a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices in the same crime, this, which was termed approvement, and which was only admitted at the discretion of the court, entitled him to pardon. But as the practice of appeal in cases of treason and felony is now abolished (59 Geo. 3, c. 46), this consequence of it has also ceased.

The practice now adopted is for the magistrate before whom the accomplice is examined, or for the court before which the trial is had, to direct that he shall be examined, upon an understanding, that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon. But this understanding cannot be pleaded by him in bar of an indictment, nor can he avail himself of it at his trial, for it is merely an equitable claim to the mercy of the crown, from the magistrate's express or implied promise of an indemnity upon certain conditions that have been performed. It can only come before the court by way of application to put off the trial, in order to give the party time to apply elsewhere. *R. v. Rudd*, Cowp. 331; 1 Leach,

¹ An accomplice may be corroborated by his wife. *State v. Moon*, 25 Ia. 128. [Blackburn v. Commonwealth, 12 Bush, (Ky.) 180. Admissions made by the prisoner are sufficient to corroborate the accomplice. *People v. Cleveland*, 49 Cal. 578.] One who confesses himself guilty of a felony, and accuses others of the same crime, in order to shield himself from punishment, is an approver, and as such is an incompetent witness; but a confession of other felonies will not make the party confessing an approver. *Myers v. People*, 26 Ill. 173; *Gray v. People*, Id. 344. An accomplice giving evidence against his associate in crime, does not thereby become entitled to pardon. *Commonwealth v. Dabney*, 1 Rob. 696. An accomplice used as a witness for the State is not entitled to his discharge as a matter of right; he must abide by the discretion of the court and prosecuting attorney. *Cummings v. State*, 4 Kan. 225. Commonwealth may proceed against accomplice who has turned State's evidence. *Commonwealth v. Brown*, 103 Mass. 422; *Same v. Denehy*, Id. 424. An accomplice testifying for the government, on cross-examination, need not disclose his criminality in other cases. *Pitcher v. People*, 16 Mich. 142. An accomplice, who has testified to facts criminalizing the prisoner and himself cannot afterwards decline to answer a question, upon the ground that it will criminate himself. *Commonwealth v. Price*, 10 Gray, 472; *Commonwealth v. Knapp*, 10 Pick. 478. An accomplice, who turns State's evidence, can keep back nothing. *Alderman v. People*, 4 Mich. 414; *State v. Condry*, 5 Jones' Law, 418. When an accomplice has a promise from the attorney-general, that he shall not be prosecuted if he will become State's evidence, and make a full disclosure, and upon such promise he makes a confession, but refuses afterwards to testify, it was held that he might be put on his trial, and the confession given in evidence against him. *Commonwealth v. Knapp*, 10 Pick. 478. 8.

115. So where two prisoners, under sentence for murder, on being brought before the K. B. by *habeas corpus*, were asked what they had to say why execution should not be awarded against them, and one of them pleaded, *ore tenus*, that the king, by proclamation in the Gazette, had promised pardon to any person, except the actual murderer, who should give information whereby such murderer should be apprehended and convicted; and that he, not being the actual murderer, had given such information, and thereby entitled himself to the pardon; such plea, or demurrer *ore tenus* by the attorney-general, was held not sufficient. *R. v. Garside*, 2 A. & E. 266, 29 E. C. L. After giving his evidence, but not in such a way as to entitle him to favor, an accomplice is frequently indicted for the same offence (see *post*); and though he may have conducted himself properly, he is sometimes proceeded against for *other* offences. Thus where an accomplice was admitted to give evidence against a prisoner for receiving stolen goods, and the latter was convicted, and the witness was afterwards prosecuted in another county for horse stealing, and convicted; a doubt arising whether this case came *136] within the equitable claim to mercy, it was referred to the judges, who were unanimously of opinion, that the pardon was not to extend to offences for which the prisoner might be liable to prosecution out of the county, and the prisoner underwent his sentence. *R. v. Duce*, 1 Burn's Justice, 281, 30th ed. So where an accomplice who had been admitted as a witness against his companions, on a charge of highway robbery, and had conducted himself properly, was afterwards tried himself for burglary, Garrow, B., submitted the point to the judges, whether he ought to have been tried after the promise of pardon; but the judges were all of opinion, that though examined as a witness for the crown, on the application of the counsel for the prosecution, there was no legal objection to his being tried for any offence with which he was charged, and that it rested entirely in the discretion of the judge whether to recommend a prisoner in such a case to mercy. *R. v. Lee*, Russ. & Ry. 361; 1 Burn, 212; *R. v. Brunton*, Id. 454. With respect to other offences, therefore, the witness is not bound to answer on his cross-examination. *R. v. West*, 1 Phill. Ev. 91, 10th ed. (3). Where a receiver discovered the principals in a felony under a promise of favor, and also discloses another felony of the same kind under an impression that by the course he had taken he had protected himself from the consequences; Coleridge, J., recommended the counsel for the prosecutor not to proceed with the indictment against the receiver for such other felony, adding, however, that if it was persisted in he was bound to try the case. The recommendation of the learned judge being yielded to, an acquittal was taken. *R. v. Garside*, 2 Lew. C. C. 38.

A prisoner who, after a false representation made by him by a constable in gaol, that his confederates had been taken into custody, made a confession, and was admitted as a witness against his associates, but on the trial denied all knowledge of the subject, was afterwards tried and convicted upon his own confession; and the conviction was upheld by all the judges. *R. v. Burley*, 2 Stark. Ev. 13, 3rd ed.

So where in a case of burglary an accomplice, who had been allowed to go before the grand jury as a witness for the crown, upon the trial pretended to be ignorant of the facts on which he had before given evidence; Coleridge, J., ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. *R. v. Moore*, 2 *Lew. C. C.* 37. So where an accomplice, after making a full disclosure before the committing magistrate, refused when before the grand jury to give any evidence at all; Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *R. v. Holtham*, *Staff. Spr. Ass.* 1843, 3 *Russ. Cri.* 601, 5th ed. (h). So where an accomplice who was called as a witness against several prisoners, gave evidence which showed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty; Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. *R. v. Stokes*, *Staff. Spr. Ass.* 1837, 3 *Russ. Cri.* 601, 5th ed. (h). The prisoner made a statement to a constable, and then repeated it to a magistrate upon oath. He then made a further statement on oath, adding, "I came here to save myself." Subsequently, he refused to prosecute. It was held by five judges out of nine that both the statements made *by him were receivable in evidence against him; and by seven out of nine that the first statement was admissible. *R. v. Gil-* [*137
lis, 11 *Cox*, *C. C. R.* (Irish) 69.

In Scotland, the course pursued with regard to an accomplice who has been admitted against his confederates, differs from that adopted by the English law, and seems better calculated to further the ends of justice. "It has been long an established principle of our law," says Mr. Alison, "that by the very act of calling the *socius* and putting him in the box, the prosecutor debars himself from all title to molest him for the future, with relation to the matter libelled. This is always explained to the witness by the presiding judge as soon as he appears in court, and consequently he gives his testimony under a feeling of absolute security, as to the effect which it may have upon himself. If, therefore, on any future occasion, the witness should be subjected to a prosecution, on account of any of the matters contained in the libel on which he was examined, the proceedings would be at once quashed by the supreme court. This privilege is absolute, and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice, indeed, may often be defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the box, but it would be much more put in hazard, if the witness was sensible that his future safety depended on the extent to which he spoke out against his associate at the bar. The only remedy, therefore, in such a case is committal of the witness for contempt or prevarication, or indicting him for perjury, if there are sufficient grounds for any of these proceedings." 2 *Alison's Prac. Cr. Law of Scotl.* 453.

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*EXAMINATION OF WITNESSES.

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Ordering witnesses out of court. In general the court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the court.¹ And the right of either party to require the unexamined witnesses to retire, may be exercised at any period of the cause. *Per* Alderson, B., *Southey v. Nash*, 6 C. & P. 632, 25 E. C. L. It is said, that with regard to a prisoner, this is not a matter of right; 1 Stark. Ev. 189, 3rd ed.; 4 St. Tr. 9. But whether it be a matter of right or of discretion for the judge, in practice the case of a prisoner forms no exception to the general rule. The rule has been held not to extend to the attorney in the cause, who may remain and still be examined as a witness, his assistance being in most cases necessary to the proper conduct of the cause. *Pomeroy v. Baddeley*, Ry. & Moo. N. P. C. 430. But it extends to the prosecutor, if it be proposed to examine him as a witness. *R. v. Newman*, 3 C. & Kir. 260, *per* Lord Campbell, C.J. So, as it seems, a physician, or other professional person, who is called to give an opinion as a matter of skill upon the circumstances of the case, may be allowed to remain. By the law of Scotland, a medical witness is

¹ *People v. Duffy*, 1 Wheel. C. C. 123; *State v. Sparrow*, 2 Murph. 487. As to the exclusion of witnesses from the court room: *Nelson v. State*, 2 Swan, 237; *Johnson v. State*, 14 Ga. 55; *Bartorius v. State*, 24 Miss. 602; *People v. Green*, 1 Park. C. R. 11; *Benaway v. Conyne*, 3 Chandler, 214; *State v. Sparrow*, 3 Humphreys, 487; *State v. Brookshire*, 2 Ala. 303; *State v. Fitzsimmons*, 20 Mo. 236. The fact that a witness, in disregard of the order of the court, continues in the court room while another is testifying, does not thereby disqualify him as a witness. *Grimes v. Martin*, 10 Ia. 347; *State v. Salge*, 2 Nev. 321; *Gregg v. State*, 3 W. Va. 705. S. *State v. Hare*, 74 N. C. 591.

The court may, at the request of the solicitor-general, before evidence given, cause the defendant's witnesses to be sworn and separated. *Bird v. State*, 50 Ga. 585.

directed to remain in court during the trial, till the medical *opinion* of other witnesses begins. *Alison's Prac. Crim. Law of Scotl.* 489.

If a witness remains in court, after an order made for the witnesses on both sides to withdraw it is said to be a rule in the Court of *Exchequer, that such a witness shall not be allowed to be afterwards examined. *Att.-Gen. v. Bulpit*, 9 Price, 4. It appears, [*139 however, that the rule in the Exchequer is confined to revenue cases, and that, in other cases, the rule is the same as it is in other courts, namely, that the rejection of the evidence is entirely in the discretion of the judge; *per Coleridge, J., Thomas v. David*, 7. C. & P. 350, 32 E. C. L.; and that it is for him to say whether, under all the circumstances of the case, he will relax the order which has been given. *Parker v. M'Williams*, 6 Bing. 683, 19 E. C. L.; *R. v. Colley, Moo. & Malk.* 329. In *Chandler v. Horne*, 2 Moo. & Rob. 423, *Erskine, J.*, stated that it was now settled by all the judges that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence; and see also to the same effect, *Cobbett v. Hudson*, 1 E. & B. 11, 72 E. C. L.; 22 Law J. Q. B. 11.

Calling all witnesses whose names are on the indictment, etc. Although a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment; *R. v. Simmonds*, 1 C. & P. 84, 12 E. C. L.; *R. v. Whitbread*, *Id.* 84 (n); yet it is usual to do so in order to afford the prisoner's counsel an opportunity to cross-examine them; *R. v. Simmonds, supra*;¹ and if the prosecutor will not call them, the judge in his discretion may. *Id.*, *R. v. Taylor*, *Id.* (n); *R. v. Bodle*, 6 C. & P. 186, 25 E. C. L. The prosecutor is not bound to call witnesses merely because their names are on the back of the indictment, but the prosecutor ought to have all such witnesses in court, so that they may be called for the defence, if they are wanted for that purpose.² If, however, they are called for the defence, the person calling them makes them his own witnesses. *R. v. Woodhead*, 2 C. & K. 520, 61 E. C. L.; *per Alderson, B.* And see *R. v. Cassidy*, 1 F. & F. 79; from which it appears that *Parke, B.*, *Cresswell, J.*, and *Lord Campbell, C. J.*, agreed in this ruling.³

The court has no power to oblige a prosecutor to give to a defendant

¹ The endorsement upon an information after going to trial of the names of additional witnesses is ground for a new trial, if done without leave of court. *People v. Moran*, 48 Mich. 639; *Stevens v. State*, 19 Neb. 647. But see *Hill v. Peoples*, 26 Mich. 496. The mistake in the name of a witness in a list furnished to the defendant is no ground for his exclusion at the trial. *State v. Burke*, 54 N. H. 92. By Illinois statute it is mandatory on the grand jury to endorse the names of those on whose testimony the indictment is found, on the indictment. *Andrews v. People*, 117 Ill. 195. The State may examine witnesses who are not endorsed on the indictment. *Ballard v. State*, 19 Neb. 609.

² *Wellar v. People*, 30 Mich. 16. Where one convicted of a burglary is named as a witness against one charged with the same offence, the accused is entitled to every inference that could be drawn from the failure of the State to call him. *People v. Gordon*, 40 Mich. 716.

³ *Bressler v. People*, 117 Ill. 422.

the additions and places of residence of witnesses named on the back of an indictment. *R. v. Gordon*, 2 Dowl. 417; 12 Law J., M. C. 84.

Calling all parties present at any transaction giving rise to a charge of homicide. On a trial for murder, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined on the part of the prosecution, Patteson, J., directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the other side. The learned judge observed, "Every witness who was present at a transaction of this sort ought to be called; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusions as to the real truth of the matter." *R. v. Holden*, 8 C. & P. 609, 34 E. C. L.¹ See also *R. v. Stroner*, 1 C. & K. 650, 47 E. C. L. And it seems that the same course should be pursued even when the party is a near relative of the prisoner, as a brother, *R. v. Chapman*, 8 C. & P. 558, 34 E. C. L.; or a daughter, *R. v. Orchard*, Id. (n). In *R. v. Holden*, it appeared that three surgeons had examined the body of the deceased, and that there was a difference of opinion among them. Two of them were called for the prosecution, but the third was not, and as his name was not on the indictment, *140] the counsel for the prosecution declined *calling him. Patteson, J., said, "He is a material witness who is not called on the part of the prosecution, and as he is in court I shall call him for the furtherance of justice." He was accordingly examined by the learned judge.

Recalling and questioning witnesses by the court. It has already appeared (*supra*) that the judge may in his discretion, for the furtherance of justice, call witnesses whom the counsel for the prosecution had refused to put into the box. So he may recall witnesses that have already been examined. Where, after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held, that the prisoner's counsel had a right to cross-examine again if he thought it material. *Per Taunton, J., R. v. Watson*, 6 C. & P. 653, 25 E. C. L. See also *R. v. Stronger*, 1 C. & K. 650, 47 E. C. L.

So during the progress of the trial the judge may question the witnesses, and although the prosecutor's counsel has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries of the witnesses he thinks fit, in order to answer the objection. *R. v. Remnant*, R. & R. 136. And in such a case the counsel for the defendant could not cross-examine the witness without leave of the judge.

¹ But in such cases the prosecuting attorney may press an unwilling witness with searching questions. *Wellar v. People*, 30 Mich. 16.

Evidence cannot be taken in cases of felony by consent, but in cases of misdemeanor it may. Where there are two prosecutions against the prisoner for felony, and his counsel offered to admit the evidence taken on the first trial, as given in the second; *Patteson, J.*, doubted whether that could be done, even by consent, in case of felony, but the learned judge directed the witnesses to be resworn, and read their evidence over to them from his notes. *R. v. Foster*, 7 C. & P. 495, 32 E. C. L. In cases of misdemeanor, evidence may be taken by consent. *Per Patteson, J., R. v. Foster, supra.* Where, however, on an indictment for perjury, it appeared that the attorneys on both sides had agreed that the formal proof should be dispensed with, and part of the prosecutor's case admitted, Lord Abinger, C. B., said, "I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel." The defendant's counsel declining to make any admission, the defendant was acquitted. *R. v. Thornhill*, 8 C. & P. 575, 34 E. C. L.

At what time the objection to the competency of a witness must be taken. It was formerly considered necessary to take the objection to the competency of a witness on the *voir dire*: and if once examined in chief, he could not afterwards be objected to on the ground of interest. *R. v. Lord Lovat*, 9 St. Tr. 639, 646, 704; 1 Phill. Ev. 85, 10th ed.; but in modern practice the rule was relaxed. The examination of a witness, to discover whether he was interested or not, was frequently to the same effect as his examination in chief, so that it saved time, and was more convenient to let him be sworn in the first instance in chief; and in case it turned out that he was interested, it was then time enough to take the objection. *Per Buller, J., Turner v. Pearte*, 1 T. R. 719; *Pengal v. Nicholson*, Wight. 64; 4 Burr. 2256. So in *Stone v. Blackburne*, 1 Esp. 37, it was said by Lord Kenyon, that objections to the competency of witnesses *never come too late, but may be made in any stage of the cause. [*141 The Court of Exchequer has decided, that the objection may be raised at any time during the trial. *Jacobs v. Layborn*, 11 M. & W. 685.¹

¹ It is entirely a matter of discretion with the court whether the preliminary oath as to interest or the oath in chief shall be administered. But the better and more approved practice now is to swear the witness in chief and bring out the facts showing his interest either on direct or cross-examination. See *Seeley v. Engell*, 17 Barb. 530. See, also, *Morton v. Beall's Adm.*, 2 H. & G. 136; *Bank of North America v. Wykoff*, 2 Y. 39, s. c. 4 Dall. 151; *Swift v. Dean*, 6 Johns. 523; *Fisher v. Willar*, 13 Mass. 379; *Evans v. Eaton*, Pet. C. C. 338; *Baldwin v. West*, Hardin, 50; *Cole v. Cole*, 1 H. & J. 572; *Butler v. Tufts*, 13 Me. 302. [It is error to permit him to testify until that has been done. *State v. Secrist*, 80 N. C. 450.] That objection to competency on the score of conviction of an infamous crime must be taken before the witness is sworn, see *People v. McGarrer*, 17 Wend. 460. The party against whom an interested witness is called to testify, must make his objections as soon as the interest is discovered and he has an opportunity of doing it; otherwise he will be considered as having waived the objection. Therefore, when a witness called by the plaintiff, was examined, cross-examined, and dismissed from the stand, and the next day the defendant objected to his competency on the ground of his interest, which was disclosed at the commencement of his examination, it was held that the objection came too late.

Where a witness who was deaf and dumb had been examined on the *voir dire*, and an interpreter was sworn to interpret by signs—which he said he could do—but after the evidence had been proceeded with for some time, he found that the witness and he could not understand one another, the judge at the trial refused to leave the evidence of the witness to the jury, but left the case to the jury upon other evidence adduced. And it was held that he had acted rightly. *R. v. Whitehead*, L. R. 1 C. C. R. 33; 35 L. J., M. C. 186.

An objection to the admissibility of a witness in high treason, on the ground that he is not properly described in the list of witnesses furnished to the prisoner, in pursuance of the statute 7 Ann. c. 21, s. 14, must be taken in the first instance, otherwise the party might take the chance of getting evidence which he liked, and if he disliked it, might afterwards get rid of it on the ground of misdescription. *R. v. Watson*, 2 Stark. 158, 3 E. C. L.; *R. v. Frost*, 9 C. & P. 126, 38 E. C. L.

Voir dire. The most convenient time to object to the competency of a witness is before he is sworn, *Yardley v. Arnold*, 10 M. & W. 145, when the witness is questioned by the court upon the points suggested by the objecting party, and extrinsic evidence upon the point may also be received; *Bartlett v. Smith*, 11 M. & W. 483; *Att.-Gen. v. Hitchcock*, 1 Ex. 91; *Cleave v. Jones*, 7 Ex. 421. But a witness may be objected to at any time after he is sworn, if anything to suggest his incompetency be discovered; *Jacobs v. Layborn*, *supra*; and the court will then inquire into the point in the same way.¹

Lewis v. Moore, 20 Conn. 211; *Dent v. Hancock*, 5 Gill, 120. After a witness is sworn it is too late to object to his competency. *Howson v. Commonwealth*, 51 Pa. St. 332. S.

¹ An election to examine the witness himself on his *voir dire* precludes a resort to evidence *aliunde* to prove his interest. *Mallett v. Mallett*, 1 Root, 501; *Lessee of Biabee v. Hall*, 3 O. 465; *Miffin v. Bingham*, 1 Dall. 275; *Cole v. Cole*, 1 H. & J. 572; *Bridge v. Wellington*, 1 Mass. 219; *Butler v. Butler*, 3 Day, 214; *Dow v. Osgood*, 2 Tyl. 28; *Welden v. Buck*, Anthon's N. P. 10 n; *Berry v. Wallin et al.*, 1 Over. 107; *Ray v. Mariner et ux.*, 2 Hawy. 385; *Chance v. Hine*, 6 Conn. 231; *Chatfield v. Lathrop*, 6 Pick. 417. [A prisoner has a right to question a witness on his *voir dire*. The court cannot refuse it, because the witness on another occasion has shown his competency. *White v. State*, 52 Miss. 216.] Though sworn on the *voir dire*, yet if his interest appears on his own examination in chief, he may be set aside. *Evans v. Eaton*, Pet. C. C. 338; *Davis v. Barr*, 9 S. & R. 138; *Baldwin v. West*, Hardin, 50. And where on his cross-examination the witness denies his interest, this does not preclude a resort to other evidence. *Stout v. Wood*, 1 Blackf. 72; 1 Dall. *supra*. So when the examination on the *voir dire* leaves it doubtful, whether the witness be or be not interested. *Shannon v. Commonwealth*, 8 S. & R. 444; *Galbraith v. Galbraith*, 6 W. 112. If he refuse to answer on the *voir dire*, the court cannot presume him interested, but must commit him for contempt. *Lott v. Burrell*, 2 Rep. Const. Ct. 167. The interest of a witness may be shown from his own examination or by evidence *aliunde*; but the adoption of either of these modes precludes a resort to the other for the same purpose and upon the same ground. *Le Barrow v. Redman*, 30 Me. 536. A resort to one mode to prove interest on one ground, does not prevent the use of the other mode to establish it on a distinct and different ground. *Stebbins et al. v. Sachet*, 4 Conn. 253. The defendant called a witness to whom the plaintiff objected on the ground of the

Examination in chief—leading questions—adverse witness. After the witness has been duly sworn by the officer of the court, he is examined in chief by the party calling him.¹ Being supposed to be in the interest of that party, it is a rule, that upon such examination leading questions shall not be put to him. Questions to which the answer "yes," or "no," would not be conclusive upon the matter in issue, are not in general objectionable. It is necessary, to a certain extent, to lead the mind of the witness to the subject of the inquiry. *Per* Lord Ellenborough, *Nicholls v. Dowding*, 1 Stark. 81, 2 E. C. L.²

want of a religious belief, and the judge admitted the testimony of witnesses in support of and in opposition to the objection, and afterwards the proposed witness was examined on his *voir dire* and having testified to his belief, was admitted to give evidence in chief. *Quin v. Crowell*, 4 Whart. 334. Where the witness on the *voir dire* denies his interest generally, he may be interrogated particularly as to his situation to show that he has none. *Emerton v. Andrews*, 4 Mass. 653; *Baldwin v. West*, Hardin, 50; *Reed's Lessee v. Dodson*, 1 Over. 396; *Williams v. Matthews*, 3 Cow. 352. *Contra*, *Moore v. Sheredine*, 2 H. & McH. 453. But see *Peter v. Beall*, 4 Id. 342. A witness who believes himself interested when in truth he is not, is competent. *State v. Clark*, 2 Tyl. 273; *Long v. Baillie*, 4 S. & R. 226; *Fernsler v. Carlin*, 3 Id. 130; *Henry v. Morgan*, 2 Binn. 497; *Williams v. Matthews*, 3 Cow. 352; *Davis v. Barclay*, 1 Harp. 63; *Rogers v. Burton*, Peck, 108; 6 Conn. Rep. 371; *Dellone v. Rekmer*, 4 W. 9; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94. *Contra*, *Richardson's Exrs. v. Hunt*, 2 Munf. 148; *Sentney v. Overton*, 4 Bibb, 445; *Trustees of Lansingburg v. Willard*, 8 Johns. 428; *Plump v. Whiting*, 4 Mass. 518; *Peter v. Beal*, *supra*; *Elliot v. Porter*, 5 Dana, 304. So an honorary obligation does not render the witness incompetent. *Long v. Baillie*, *supra*; *Gilpin v. Vincent*, 9 Johns. 219; *Carman v. Foster*, 1 Ash. 133; *Smith v. Downs*, 6 Conn. 365. See *Skilling v. Bolt*, 1 Conn. 147; *Coleman v. Wise et al.*, 2 Johns. 165; *Moore v. Hitchcock*, 4 Wend. 202. The declaration of a witness as to his interest will not exclude him. *Pierce v. Chase*, 8 Mass. 487; *Commonwealth v. Waite*, 5 Id. 261; *Vining v. Wooton*, Cook's Rep. 127; *Henry v. Morgan*, 2 Binn. 497; *Fernsler v. Carlin*, 3 S. & R. 130; *Lessee of Pollock v. Gillespie*, 2 Y. 129. *Contra*, *Colston v. Nicholls*, 1 H. & J. 105; *Anon.*, 2 Hayw. 340. See *Patton v. Halstead*, 1 Cox, 277. But the admission of his interest by the party who calls him will exclude him. *Pierce v. Chase*, 8 Mass. 487; *Nichols v. Holgate et al.*, 2 Aik. 138. If witness shown to be incompetent on his *voir dire*, be allowed to testify, facts proved by him on his examination in chief cannot be looked to for the purpose of curing the error. *Lay v. Lawson*, 23 Ala. 377. [When the competency of a witness is called in question it is error to permit him to testify before that question is determined. *State v. Secrist*, 80 N. C. 450.] A witness cannot, at the instance of the party calling him, repel an objection to his competency on the ground of interest established by other evidence. *Anderson v. Young*, 21 Pa. St. 443. A witness on his *voir dire* is competent to prove that he has been released. *Ault v. Rawson*, 14 Ill. 484. The injured party is a competent witness under an indictment for forcible entry and detainer. *Kersh v. State*, 24 Ga. 191. A witness who is promised by a party a sum of money if he will attend as a witness, and the party should gain the case, is incompetent. *Holland v. Ingram*, 6 Rich. 50. The interest of the witness must be present, certain, and vested. *Harvey v. Anderson*, 12 Ga. 69; *Scott v. Jester*, 8 Eng. 437. In an indictment for perjury, the prosecutor, unless he has a direct, certain and immediate interest in the record, is a competent witness. *State v. Farrow*, 10 Rich. Law, 165. Admissions made by a witness out of court are not evidence to exclude him on the ground of interest, but the statements of the party calling him are. *Walker v. Coursin*, 19 Pa. St. 321; *Martin v. Farnum*, 4 Fost. 191; *Lessee of Snyder v. Snyder*, 6 Binn. 483; *Stanford v. Stanford et al.*, 9 Conn. 275. S.

¹ When a witness is called and sworn, an answer which he makes to a question put by the clerk of the court, demanding his name, is part of his testimony. *People v. Winters*, 49 Cal. 383. A witness should be allowed to finish his answer before being pressed with another question. *State v. Scott*, 80 N. C. 365.

² What are leading questions: See *Kemmerer v. Edelman*, 23 Pa. St. 143; *Wilson v. McCullough*, Id. 440; *Lee v. Tingas*, 7 Md. 215; *Sexton v. Brock*, 15 Ark. 345;

Thus, where the question is, whether A. & B. were partners, a witness may be asked whether A. has interfered in the business of B. *Id.* So where a witness being called to prove a partnership could not recollect the names of the component members of the firm, so as to repeat them without suggestion: Lord Ellenborough, alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names, ruled that there was no objection to asking the witness, whether certain specified persons were members of the firm. *Acerro v. Petroni*, 1 Stark. 100, 2 E. C. L. So, for the purpose of identification, a particular prisoner may be pointed out to the witness, who may be asked whether he is the man. *R. v. De Berenger*, 1 Stark. Ev. 170, 3rd ed.; 2 Stark. N. P. C. 129 (n), 3 E. C. L. And in *R. v. Watson*, 2 Stark. N. P. C. 128, 3 E. C. L., the court held that the counsel for the prosecution might ask in the most direct terms, whether any of the prisoners was the person meant and described by *142] the witness. So where a question arose as to the contents of a written instrument which had been lost, and in order to contradict a witness who had been examined as to the contents, another witness was called; Lord Ellenborough ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side, otherwise it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 Campb. 42.

Upon the same principle, viz., the difficulty or impossibility of attaining the object for which the witness is called, unless leading questions are permitted to be put to him, they have been allowed where they are necessary to establish a contradiction. Thus, where counsel, on cross-examination, asked a witness as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and the witness denying having used them, the counsel called a person to prove that he had, and read to him the particular words from his brief, *Abbott, C. J.*, held that he was entitled to do so. *Edmonds v. Walter*, 3 Stark. N. P. C. 7, 3 E. C. L.

Where a witness, examined in chief, by his conduct in the box shows himself decidedly adverse to the party calling him, it is in the discretion of the judge to allow him to be examined, as if he were on cross-

Willis v. Quinby, 11 Fost. 485; *Bartlett v. Hoyt*, 33 N. H. 151; *Hoffer v. State*, 16 Ark. 534; *Spear v. Richardson*, 37 N. H. 23; *Floyd v. State*, 30 Ala. 511; *Mathis v. Buford*, 17 Tex. 152; *Dudley v. Elkins*, 39 N. H. 78; *Allen v. State*, 28 Ga. 395; *Page v. Parker*, 40 N. H. 47; *Pelamoures v. Clark*, 9 Ia. 1; *Shields v. Guffey*, *Id.* 322; *Hopper v. Commonwealth*, 6 Gratt. 684. [A question which suggests the answer is not the less leading because propounded in the alternative. *State v. Johnson*, 29 La. An. 717. Leading questions should not be put to children. *Coon v. State*, 99 Ill. 368; s. c. 39 Am. Rep. 28.] Where a witness was asked a leading question which was objected to and ruled out, it was held, that the witness might testify to the same point if the question be properly put. *Heisler v. State*, 20 Ga. 153. Leading questions on cross-examination: *Boles v. State*, 24 Miss. 445; *Long v. Steiger*, 8 Tex. 460. S.

The rules of examination as to leading questions, matters of hearsay, etc., do not apply to what is introduced by way of introduction, but only to the material parts of the testimony. *Shultz v. State*, 5 Tex. App. 390.

examination. *Bastin v. Carew*, Ry. & Moo. N. P. C. 127; *Clarke v. Saffery*, Id. 126; *Murphey's case*, 8 C. & P. 297, 34 E. C. L.; *per Lord Abinger*, C. B., *Chapman's case*, 8 C. & P. 558, 34 E. C. L. But if he stands in a situation which, of necessity, makes him adverse to the party calling him, it was held by Best, C. J., that the counsel may, as a matter of right, cross-examine him. *Clarke v. Saffery*, Ry. & Moo. N. P. C. 126. Somewhat similar to this is the question whether, where a witness, called for one party, is afterwards recalled by the other, the latter party may give his examination the form of a cross-examination; and it has been held, by Lord Kenyon, that he may; for having been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case. *Dickenson v. Shee*, 4 Esp. 67; 1 Stark. Ev. 187, 3rd ed.

Contradicting your own witness. The rule as to the right of a party to contradict his own witness will be found discussed *ante*, p. 105.

Cross-examination. Leading questions are admitted on cross-examination, in which much larger powers are given to counsel than in the original examination.¹ The form of a cross-examination, however, depends in some degree, like that of an examination in chief, upon

¹ Upon cross-examination, the witness cannot be asked a leading question in respect to new matter. *Harrison v. Rowan*, 3 Wash. C. C. 580. "And here," says Gibson, C. J., in *Ellmaker v. Buckley*, 16 S. & R. 77, "I take occasion in broad terms to dissent from the doctrine broached in Mr. Phillipps's Law of Evidence (211), that a witness actually sworn, though not examined by the party who has called him, is subject to cross-examination by the adverse party; and that the right to cross-examine is continued through all the subsequent stages of the cause, so that the adverse party may call the same witness to prove his case, and for that purpose ask him leading questions." The defendant cannot cross-examine the plaintiff's witnesses to matter entirely new, in order to introduce his defence untrammelled by the rules of a direct examination. *Castor v. Bavington*, 2 W. & S. 505; *Floyd v. Bovard*, 6 Id. 75. [See *Addison v. State*, 48 Ala. 478. If he does so cross-examine he makes the witness his own, and the opposite party may cross-examine on such new matter. *Bassham v. State*, 38 Tex. 622.] A party may cross-examine as to the *res gestæ* given in evidence, though it be new matter. *Markley v. Swartzlander*, 8 W. & S. 172. [State v. Sayres, 58 Mo. 535. *Henderson v. Hydraulic Works*, 9 Phila. (Pa.) 100. *Greenley v. State*, 60 Ind. 141.] When a witness is called to state a peculiar fact, it is improper to lead him to a full statement of the defendant's case which is not yet opened to the court and jury; but it is not error to permit him to answer on his cross-examination a single question closely connected with what is proved, even if the answer operate in favor of the party putting the question. *Farmer's Bank v. Strohecher*, 9 W. 183. A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him on other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause. A party cannot, by his own omission to take an objection to the admission of improper evidence brought out on a cross-examination, found a right to introduce testimony in chief to rebut or explain it. *Philadelphia & Trenton R. R. Co. v. Stimpson*, 14 Pet. 448. [See *Wagner v. People*, 30 Mich. 384.] *Contra*, *Lewis v. Hodgdon*, 17 Me. 267. S.

Statements elicited in cross-examination are conclusive. *State v. Roberts*, 81 N. C. 605. Where a wife has testified in her husband's behalf, she may be cross-examined touching her testimony at a former examination of the same cause. *Hampton v. State*, 45 Tex. 154.

the bias and disposition evinced by the witness under interrogation. If he should display a zeal against the party cross-examining him, great latitude with regard to leading questions may with propriety be admitted. But if, on the other hand, he betrays a desire to serve the party who cross-examines him, although the court will not in general interfere to prevent the counsel from putting leading questions, yet it has been rightly observed, that evidence obtained in this manner is very unsatisfactory and open to much remark. The rule with regard to putting leading questions on cross-examination was thus laid down by Mr. Justice Buller: "You may lead a witness upon cross-examination, to bring him directly to the point, as to the answer; but you cannot go the length of putting into the witness's *143] *mouth the very words he is to echo back again." *R. v. Hardy*, 24 How. St. Tr. 755.

In a later case, where an objection was made to leading a willing witness, *Alderson, B.*, said, "I apprehend you may put a leading question to an unwilling witness, on the examination in chief, at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not." *Parkin v. Moon*, 7 C. & P. 405, 32 E. C. L.

When two or more prisoners are tried on the same indictment, and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them. *R. v. Burdett*, *Dears. C. C. R.* 431; 24 L. J., M. C. 63.

Cross-examination of witnesses as to previous statements in writing. It was settled in *The Queen's case*, 2 B. & D. 292, that, when upon cross-examination a witness is asked, whether or no he has made any previous statement, the opponent party may interfere and ask, whether the representation referred to were in writing or verbal. If it appears to be in writing, then the writing itself must, if possible, be produced in order to show its contents, and they cannot be got from the witness under cross-examination. But if for any valid reason the writing cannot be produced, then the usual principles on which secondary evidence is admissible will apply, and the contents of the document may be proved by the admission of the witness.

By 28 Vict. c. 18, s. 4, if a witness upon cross-examination, as to a former statement made by him relative to the subject-matter of the indictment or proceeding and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

By the 28 Vict. c. 18, s. 5, a witness may be cross-examined as to the previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him. but if it is intended to

contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he may think fit. When the attention of the witness has been called to the writing, and it is desired to contradict him, the statement must be put in evidence. *R. v. Riley*, 4 F. & F. 964; *R. v. Wright*, Id. 967.¹ In *R. v. Hughes*, Derby Winter Assizes, 1868, Byles, J., said the proviso as to the judge doing as he thinks fit, applied equally before any answer had been given by the witness or after,—in fact to the whole of the trial; and the use he always made of a deposition was to have it read before any attempt was made to contradict the witness by it.

If the counsel on cross-examination puts a paper into the witness's hand, and questions him upon it, the counsel on the other side has a *right to see the paper, and re-examine upon it. *R. v. Dun-* [*144
combe, 8 C. & P. 369, 34 E. C. L.

As to the proper mode of conducting a cross-examination on depositions, the following cases were decided before the passing of the statute above cited; and see *ante*, p. 67.

In *R. v. Edwards*, 8 C. & P. 26, 34 E. C. L., it was proposed on the part of the prisoner to put the depositions into the hands of a witness, and to desire him to look at his own, and then to ask him whether he would adhere to the statement which he had just made, and the judges (Littledale and Coleridge, JJ.), thought there was no objection to this. But in *R. v. Ford*, 2 Den. C. C. 245, in which a similar course had been pursued, and the opinion of the Court of Criminal Appeal asked upon its propriety, Lord Campbell refused to hear it argued, saying it was *res judicata*; and referred to a case reserved by Parke, B., with a note of which the learned baron had furnished the court, and in which the judges decided that this course was inexpedient, and ought not to be allowed. Lord Campbell added, that the proper course was to read the deposition at the time, or put it in afterwards as the evidence of the party so using it.

The court, however, in its discretion will occasionally put the witness's deposition into his hands, or cross-examine or allow him to be cross-examined upon it without giving the counsel for the crown a right to reply; for an instance of this see *R. v. Quin*, 4 F. & F. 818. See also, *R. v. Hughes*, *supra*.

In *R. v. Smith*, 1 Den. C. C. 536, the magistrate's clerk had put, irregularly, some questions to the witnesses, the answers to which were inserted by him in the depositions. Afterwards the witnesses appeared again before the magistrates, and, in the presence of the prisoners,

¹ In impeaching a witness by proof of former statements, when those statements are in writing, the whole should be shown to the witness. In rebuttal, the whole may be read to the jury. *Wills v. State*, 74 Ala. 21.

were re-sworn; the depositions were read over, an opportunity was given to the prisoners to cross-examine the witnesses, and the depositions were then signed. On the trial the prisoners' counsel, without putting in the depositions, proposed to cross-examine a witness upon what passed between him and the magistrate's clerk, which the judge at the trial refused to permit; but the Court of Criminal Appeal, upon a case reserved, held that the question was proper, inasmuch as the magistrate's clerk, a person in no authority, could not, by any act of his, attach to the writing a character which would exclude parol evidence of that which was so written.

On what subjects a witness may be cross-examined. A witness may be questioned on cross-examination not only on the subject of inquiry, but upon any other subject, however remote, for the purpose of testing his character for credibility, his memory, his means of knowledge, or his accuracy. Whether or no the question put will have that effect will depend on the circumstances of the case, and frequently also upon information which is in possession of the cross-examining counsel only; judges, therefore, are in the habit of granting considerable license to counsel in this matter, from the implicit confidence which is placed in them that they will not turn the power, which is put in their hands for the purposes of justice, into an instrument of oppression. The moment it appears that a question is being put which does not either bear upon the issue, or enable the jury to judge of the *value* of the witness's testimony, it is the duty of the court to interfere, as well to protect the witness from what then *145] *becomes an injustice or an insult, as to prevent the time of the court from being wasted.¹

As to when a witness may refuse to answer questions put to him, see *post*, p. 149.

Cross-examination of witnesses producing documents only. Where a witness is called merely to produce a document which can be proved by another, and he is not sworn, he is not subject to cross-examination. *Simpson v. Smith*, 1822, *cor.* *Holroyd, J.*; 2 *Phill. Ev.* 467, 10th ed.; and *per* *Bayley, J.*, 1824, *Stark. Ev.* 196, 4th ed.; *Davis v. Dale, Moo. & Malk.* 514. Thus where, on an indictment for perjury, a sheriff's officer has been subpoenaed to produce a warrant of the sheriff, after argument, he was ordered to do so without having been sworn. *R. v. Murlis, Moo. & Malk.* 515. But where the party producing a document is sworn, the other side is entitled to cross-examine him, although he is not examined in chief. *R. v. Brooks*, 2 *Stark.* 472, 3 *E. C. L.* Where, however, a person called to produce a document, was sworn by mistake, and asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him. *Rush v. Smyth*, 4 *Tyrw.* 675; 1 *Cr. M. & R.* 94. So, where a witness has been asked only one immaterial question, and his evidence

¹ Where exception is not taken to improper matter it is waived. *State v. Mills*, 88 *Mo.* 417.

is stopped by the judge, the other party has no right to cross-examine him. *Creevy v. Carr*, 7 C. & P. 64, 32 E. C. L. Where a witness is sworn, and gives some evidence, if it be merely to prove an instrument, he is to be considered a witness for all purposes. *Morgan v. Bridges*, 2 Stark. N. P. 314, 3 E. C. L.

Re-examination. A re-examination which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must of course be confined to the subject-matter of the cross-examination. Stark. Ev. 231, 4th ed. The re-examination of a witness is not to extend to any new matter, unconnected with the cross-examination, and which might have been inquired into on the examination in chief.¹ If new matter is wanted, the usual course is to ask the judge to make the inquiry; in such cases he will exercise his discretion, and determine how the inquiry, if necessary, may be most conveniently made, whether by himself or by the counsel; 1 Phill. Ev. 473, 10th ed.²

The rule with regard to re-examinations is thus laid down by Abbott, C. J., in *The Queen's case*, 2 Br. & Bingh. 297, 6 E. C. L. "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful: and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness." "I distinguish between a conversation which a witness may have had with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit relative to the subject-matter of the suit, are in themselves evidence against him in the suit: and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected [*146 with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against the party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion." In *Prince v. Samo*, 7 A. & E. 627, 34 E. C. L., the Court of Queen's Bench said, that they could not assent to the doctrine laid down in the above case, and they held, that when a statement made by a party to a suit in giving evidence on a former trial, has been got out on cross-examination, only so

¹ *Schaser v. State*, 36 Wis. 429.

² Counsel is not entitled to recall and cross-examine the prosecutor, because another witness for the State gives a different account to that given by the prosecutor. *People v. Parton*, 49 Cal. 632.

much of the remainder of the evidence is allowed to be given on re-examination as tends to qualify or explain the statement made on cross-examination. Recognized in *Sturge v. Buchanan*, 10 A. & E. 598.

Where one of the plaintiff's witnesses stated on cross-examination facts not strictly evidence, but which might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. *Blewett v. Tregonning*, 3 A. & E. 554, 30 E. C. L.¹

Memorandum to refresh witness's memory. It has already been stated, that a witness may refer to an informal examination taken down by himself, in order to refresh his memory.² *Ante*, p. 64. So he may refer to any entry or memorandum he has made shortly after

¹ In New Hampshire if one party puts in irrelevant testimony, the other party may reply to it. *Furbush v. Goodwin*, 5 Foster, (N. H.) 425, but the general rule is otherwise. *Mitchell v. Sellman*, 5 Md. 376; *People v. Beach*, 87 N. Y. 508; *Commonwealth v. Ricker*, 131 Mass. 581. Where a witness on cross-examination denies having made a certain remark on which he is questioned, he cannot on re-examination be questioned for the purpose of drawing out the entire conversation. *Greer v. State*, 6 Barter, (Tenn.) 629. See also *State v. Robinson*, 47 Ia. 489.

² *Holladay v. Marsh*, 2 Wend. 142; *Lawrence v. Barker*, 5 Pick. 301; *Feeter v. Heath*, 11 Wend. 477. Where a clerk in a bank called to prove notice of a dishonored note payable abroad, testified that two notices of non-payment for the indorsers were received by the bank, and he made the following memorandum on one for the bank: "Delivered like notice to M., June 4, 1839," which was produced; and he further testified that he made this memorandum at the time it purports to have been made, and that from the facts of receiving the notices and making the memorandum, he had no doubt but that he had delivered such notices to the indorsers, though he had no recollection of having delivered them; it was held that the said evidence was admissible. *New Haven Co. Bank v. Mitchell et al.*, 15 Conn. 206. [*Cowles v. State*, 50 Ala. 454.] Where a witness testified that he was present at a conversation and made a memorandum of it immediately after it took place; that he had now no recollection of all the particulars, but that he had no doubt that the facts stated in the memorandum were true, and that he should have sworn to them from recollection within a short time afterwards, the memorandum was admitted in evidence, in connection with his testimony to show the particulars of the conversation. *Haven v. Wendell*, 11 N. H. 112. See *O'Neill v. Walton*, Rich. 234. It is necessary that a witness testifying after inspecting a memorandum in court, should be able, after such inspection, distinctly to recollect the facts independent of the written memorandum. *Green v. Brown*, 3 Barb. 119. A witness may refresh his memory by referring to his own deposition given before a committing magistrate. *Atkins v. State*, 16 Ark. 568. If witness swear that he knows that the memorandum when made was true, though his memory is not refreshed by it, it may be read. *State v. Colwell*, 3 R. I. 132; *Webster v. Clarke*, 10 Fost. 245; *Halsey v. Sinsebaugh*, 1 Smith, 485; *Russell v. Railroad*, 3 Smith, 134; *Taylor v. Stringer*, 1 Hilt. 377; *Guy v. Mead*, 8 Smith, 462; *State v. Rawle*, 2 N. & McC. 331. *Contra*, *People v. Elepa*, 14 Cal. 144. Memorandum by third person: *Green v. Caulk*, 16 Md. 556; *Coffin v. Vincent*, 12 Cush. 98. A witness may refresh his memory by reading a schedule prepared by his clerk in his presence and under his direction. 37 Me. 246. As to memorandum to refresh memory generally: *Massey v. Hackett*, 12 La. 54; *Davidson v. Lallarde*, Id. 826; *Treadwell v. Wells*, 4 Cal. 260; *Clark v. State*, 4 Ind. 156; *Huff v. Bennett*, 2 Seld. 337; *Harrison v. Middleton*, 11 Gratt. 527. *S. Chute v. State*, 19 Minn. 271; *People v. Cotta*, 49 Cal. 166.

A paper may be read even in the presence of the jury to refresh the memory of a witness, but the jury must be instructed to disregard it as evidence in itself. *Harvey v. State*, 40 Ind. 516. A public officer may refresh his memory by extracts from his own records. His testimony is not precluded by a statute requiring certified copies of such records to be given in evidence. *Clough v. State*, 7 Neb. 320.

the occurrence of the fact to which it relates, although the entry or memorandum would not of itself be evidence, *Kensington v. Inglis*, 8 East, 289; as formerly, on unstamped paper, *Maugham v. Hubbard*, 8 B. & C. 14, 15 E. C. L. But a witness cannot refresh his memory by extracts from a book, though made by himself, *Doe v. Perkins*, 3 T. R. 749; or from a copy of a book; for the rule requiring the best evidence makes it necessary to produce the original, though used only to refresh the memory. *Burton v. Plummer*, 2 A. & E. 343, 344, 29 E. C. L.; *Alcock v. The Royal Exchange Ins. Co.*, 13 Q. B. 292, 66 E. C. L.

Where a witness on looking at a written paper has his memory so refreshed, that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. Thus where it has been material to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them. *Taylor*, Ev. 1219, 6th ed., and cases there cited.

Where the witness cannot speak without referring to a book, the book must be produced in court. *Per Coleridge, J.*, *Howard v. Canfield*, 5 Dowl. P. C. 417. If produced, the counsel for the other party has a right to see it, and cross-examine from it. *R. v. Hardy*, 24 How. St. Tr. 824; or he may look at it and ask when it was written, without being bound to put it in evidence. *R. v. Ramsden*, 2 C. & P. 603, 12 E. C. L. If he cross-examines to other entries than those referred to by the witness, he makes them part of his own evidence. *Per Gurney, B.*, *Gregory v. Travenor*, 6 C. & P. 281, 25 E. C. L.

A photograph, said to be that of a person whose identity had to be proved upon a trial for bigamy, was allowed to be shown to two persons who had known him, on the ground that it was a permanent visible representation of the image made on the minds (the retinas of *the eyes) of the witnesses by the sight of the person represented, so that it was "only another species of the evidence [*147 which persons give of identity, when they speak merely from memory." *R. v. Tolson*, 4 F. & F. 104.

Examination as to belief. A witness can depose to such facts only as are within his own knowledge; but even in giving evidence in chief, there is no rule which requires a witness to depose to facts with an expression of certainty that excludes all doubt in his mind. It is the constant practice to receive in evidence a witness's belief of the identity of a person, or of the fact of a certain writing being the handwriting of a particular individual, though the witness will not swear positively to these facts.¹ See *R. v. Miller*, 3 Wils. 427. It has been

¹ A witness must not swear to impression simply. That is descending to a test too vague. It should be persuasion or belief founded on facts within his own knowledge. *Carter v. Connell*, 1 Whart. 392; *Carmalt v. Post*, 8 W. 406; *Salmon v. Feinour*, 6 G. & J. 60; *Jones v. Chiles*, 2 Dana, 32. [*State v. Norton*, 76 Mo. 180; *State v. Thorp*, 72 N. C. 186; *McKnight v. State*, 6 Tex. App. 153; *Cummins v. State*, 58 Ala. 387. But he

decided, that for false evidence so given, a witness may be indicted for perjury. *R. v. Pedley*, 1 Leach, 325; *R. v. Schlesinger*, 10 Q. B. 670, 59 E. C. L.

Examination as to opinion. Although, in general, a witness cannot be asked what his opinion upon a particular question is, since he is called for the purpose of speaking as to *facts* only; yet where matter of skill and judgment is involved, a person competent to give an opinion may be asked what that opinion is.¹ Thus an engineer

may give his opinion on a matter with which he is specially acquainted. *Walker v. State*, 58 Ala. 393.] The testimony of a witness, *that he thought* the plaintiff told him that a certain sum of money had been paid to the plaintiff—*was very confident* he said so, but would not swear that he did—is a statement of the strength of the recollection of a fact by the witness, and is admissible evidence. *Lewis v. Freeman*, 17 Me. 260. The only impression which a witness should be allowed to state should be that of a fact feebly impressed upon his memory, and not the result of a process of reason and judgment. *Crowell v. Western Reserve Bank*, 3 O. 406. [A witness cannot give his opinion as to the person meant in a libel. *People v. Parr*, 42 Hun. (N. Y.) 313.] The testimony of a witness will not be rejected because he accompanies it with the expression, "such is the impression of my mind," as every witness must swear according to the impression of his mind more or less strong. *Franklin v. City of Macon*, 12 Ga. 257. S. On a trial for assault with intent to ravish, the prosecutrix cannot testify as to the prisoner's intentions. *Scott v. State*, 48 Ala. 420.

¹ *Rochester v. Chester*, 3 N. H. 349; *Forbes v. Carothers et al.*, 3 Y. 527; *Carmalt v. Post*, 8 W. 406; *Gentry v. McMinnis*, 3 Dana, 382; *Bullock v. Wilson*, 5 Porter, 338; *Kellogg v. Krauser*, 14 S. & R. 137; *Morse v. State*, 6 Conn. 9; *People v. De Graff*, 1 Wheel. C. C. 205. [*People v. Rolfe*, 61 Cal. 540. See *Smith v. State*, 55 Ala. 1.] The opinions of witnesses based upon a state of facts sworn to by others, are not proper evidence except in matters lying peculiarly within the knowledge of experts. *Paige v. Hazard*, 5 Hill, 603. In questions of identity and personal skill, a witness may testify to a belief not founded in knowledge, but the rule is otherwise in respect to facts which may be supposed to be within the compass of memory. *Carmalt v. Post*, 8 W. 406. [*State v. Babb*, 76 Mo. 501; *People v. Williams*, 29 Hun. (N. Y.) 520. On the question of a prisoner's identity it is error to reject testimony that a person who knew him, met a stranger, who so closely resembled him that he twice started to speak to him, believing him to be the prisoner. *White v. Commonwealth*, 80 Ky. 480; *State v. Witham*, 72 Me. 531. On impression of identity. *Woodward v. State*, 4 Baxter, (Tenn.) 322.] An opinion expressed by the crew of a vessel, in consultation with the master, on the soundness of a link in a chain cable which they were paying out to prevent her from dragging her anchor, is admissible in proof of its adequacy to the ordinary exigencies of the navigation. *Reed v. Dick*, 8 W. 479. Testimony of the resemblance of the child to the alleged father, or the want of it, not being matter of fact, but merely of opinion, is not admissible. *Kenniston v. Rowe*, 16 Me. 38. On a question of mental capacity, the opinion of an intimate acquaintance, not a medical man, is competent when connected with facts and circumstances within his knowledge, and disclosed by him in his testimony as the foundation of his opinion. *Culver v. Haslam*, 7 Barb. 314. It is not, in general, competent for witnesses to state opinions or conclusions from facts, whether such facts are known to them or derived from the testimony of others. The exceptions to the rule are confined to questions of science, trade, and a few others of the same nature. *Morehouse v. Matthews*, 2 Comst. 514. [*Debbs v. State*, 43 Tex. 650; *State v. Stickley*, 41 Ia. 232; *Lambkin v. State*, 12 Tex. App. 341. A witness cannot testify to an alibi from his belief that the defendant was in the room in which he was sleeping all night. *Bennett v. State*, 52 Ala. 370. But see *State v. Phair*, 48 Vt. 366.] A witness may be asked whether in his opinion the prisoner was intoxicated at the time of the offence. *People v. Eastwood*, 4 Ker. 562. [*Pierce v. State*, 53 Ga. 365; *State v. Huxford*, 47 Ia. 16. But they cannot give their opinion of mental capacity from having seen defendant drunk on other days than that of the murder. *Nevling v. Commonwealth*, 98 Pa. St. 322.] A witness may be asked and may state his opinion as to the time of day when an event took place, and he may state his opinion as to the length of time which elapsed between two events. *Campbell v. State*, 23 Ala. 44. The mere opinion of a witness with regard to the age of a

may be called to say what, in his opinion, was the cause of a harbor being blocked up. *Folkes v. Chad*, 3 Dougl. 157, 26 E. C. L.; 4 T. R. 498. In a variety of other cases, also, such evidence has been admitted. "Many nice questions," observes Lord Mansfield, "may arise as to forgery, and as to the impression of seals, whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken." *Folkes v. Chad*, 3 Dougl. 159, 26 E. C. L. So it seems is the opinion

person from his appearance, unaccompanied by the facts on which that opinion is founded, is inadmissible as evidence. *Morse v. State*, 6 Conn. 9. [*Commonwealth v. O'Brien*, 134 Mass. 198.] A party has no right to ask the opinion of a professional witness upon any question except one of skill or science. *People v. Bodine*, 1 Denio, 282; *Woodin v. People*, 1 Park. C. R. 464; *People v. Thurston*, Id. 49. When the opinion of witnesses not experts are admissible, see *Cooper v. State*, 23 Tex. 331. [*State v. Folwell*, 14 Kan. 105; *Commonwealth v. Sturtevant*, 117 Mass. 122.] The opinions of a witness on a question not involving medical skill or science is inadmissible as evidence. *Woodin v. People*, 1 Park. C. R. 464. [But the correspondence between footprints seen at the time and place of crime and the feet of the prisoner is a matter of fact to which any witness observing can testify. *Young v. State*, 68 Ala. 369; *Murphy v. People*, 63 N. Y. 590. The witness should not be allowed to give his opinion as to whether the prisoner's foot made the track. *Clough v. State*, 7 Neb. 320. Nor where the defence is justifiable homicide, as to whether accused was in imminent danger. *State v. Rhoads*, 29 O. St. 171. Nor on cross-examination as to whether a surgeon who dressed deceased's wound was drunk. *Batten v. State*, 80 Ind. 394. Nor as to whether a homicide was unprovoked. *Kennedy v. Commonwealth*, 14 Bush, (Ky.) 340.] Medical testimony, as to the injuries likely to be produced under a given state of facts, is properly admitted, where the witness states the precise facts on which he bases his opinion, and the court does not withdraw from the jury the right to consider whether these facts are established by the testimony. *Wendell v. Troy*, 39 Barb. 329. An expert may not only testify to opinions but may state general facts which are the result of scientific knowledge or general skill. *Emerson v. Lowell Gas Light Co.*, 6 Allen, 146. An expert cannot in an opinion assume facts which are not the subject-matter of professional knowledge, but questions for the jury. *Moore v. State*, 17 O. St. 521. On the trial of an indictment for murder, a surgeon is not competent to give an opinion as an expert as to the probable position of the body of the deceased when struck. *Kennedy v. People*, 39 N. Y. 245. A medical witness cannot express an opinion upon the evidence in the case. *State v. Felter*, 25 Ia. 67. A medical expert may give his opinion on a supposititious statement made to him as illustrative of the case on trial. *Perkins v. Concord Railroad*, 44 N. H. 223; *Fairchild v. Bascomb*, 35 Vt. 398.

As to standard medical works as evidence: See *Luning v. State*, 1 Chand. 178; *Merkle v. State*, Shep. Sel. Cas. 45, 37 Ala. 139; *State v. O'Brien*, 7 R. I. 336.

As to the testimony of experts generally: See *State v. Ward*, 39 Vt. 225; *Caleb v. State*, 39 Miss. 721; *Rosenheim v. America Ins. Co.*, 33 Mo. 230; *Johnson v. State*, 37 Ala. 457; *State v. Shinborn*, 46 N. H. 497; *Commonwealth v. Choate*, 105 Mass. 451; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Sheldon v. State*, 34 Tex. 662. S.

On the market value of any property: See *Todd v. Warner*, 48 Howard, (N. Y.) 234. The opinion of a witness ignorant of anatomy is inadmissible as to the sex of a person from an examination of the skeleton. *Wilson v. State*, 41 Tex. 320. An inference necessarily arising from a set of facts, is not a mere expression of opinion, but is admissible as a statement of fact. *Lewis v. State*, 49 Ala. 1; *Matteson v. State*, 55 Ala. 224. Familiarity with the prisoner's handwriting will not render the opinion of a witness, that he could not have committed the forgery, competent. *Burruss v. Commonwealth*, 27 Gratt. (Va.) 934. Nor can a witness in order to prove that a forged note was knowingly uttered by A. testify that he had seen another note in A.'s possession which in his opinion professed to have the signatures of the same parties. *State v. Breckenridge*, 67 Ia. 204. A witness skilled in any specialty may testify in regard to it. *Wynne v. State*, 56 Ga. 113. A fireman is not an expert on the influence of wind in directing the course of a fire, or on fires creating their own currents. *State v. Watson*, 65 Me. 74. A chemist and toxicologist is an expert on poisons, though not a physician. *State v. Cook*, 17 Kan. 392.

of any person in the habit of receiving letters, of the genuineness of a post-mark. See *Abbey v. Lill*, 5 Bingh. 299, 15 E. C. L. So antiquaries as to the date of ancient handwriting. *Tracy Peerage*, 10 Cl. & Fin. 191. So the opinion of a ship-builder on a question of seaworthiness. *Thornton v. Roy*, Exch. Ass. Co., Peake, N. P. C. 25; 1 Camp. 117; *Chapman v. Walton*, 10 Bingh. 57, 25 E. C. L. However, the Court of Queen's Bench in *Campbell v. Rickards*, 5 B. & Ad. 840, 27 E. C. L., held (overruling several previous decisions), that the materiality of a fact, concealed at the time of insuring, was a question for the jury alone. "Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties acted in one way rather than another."

It is the constant practice to examine medical men as to their judgment with regard to the cause of a person's death, who had suffered violence; and where, on a trial for murder, the defence was insanity, the judges, to whom the point was referred, were all of opinion that in such a case a witness of medical skill might be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it? Several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz., whether, *148] *from the other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. *R. v. Wright*, Russ. & Ry. 456. On an indictment for cutting and maiming, *Park, J.*, on the authority of the above case, allowed a medical man, who had heard the trial, to be asked whether the facts and appearances proved showed symptoms of insanity. *R. v. Scarle*, 1 Moo. & R. 75. And it seems that in *McNaughten's* case such questions were allowed to be asked. 3 Russ. Cri. 571, 5th ed. (h). A question may arise in these cases, whether, where a witness, a medical man, called to give his opinion as matter of skill, has made a report of the appearances or state of facts at the time, he may be allowed to read it as part of his evidence. The practice in Scotland, on this point is as follows: The scientific witness is always directed to read his report, as affording the best evidence of the appearances he was called on to examine; yet he may be, and generally is, subjected to a further examination by the prosecutor, or to a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions made to him by the prisoner, or the like *utitur jure communi*, he stands in the situation of an ordinary witness, and can only refer to the memoranda to refresh his memory. *Alison's Prac. Cr. Law of Scotland*, 541.¹ So also it seems skilled witnesses

¹ As to the evidence of experts generally, see *Norman v. Wells*, 17 Wend. 136; *Cattrill v. Myrick*, 3 Fairfield, 222; *Boies v. McAllister*, Id. 308; *Lester v. Pittsford*,

may refresh their memory by referring to professional treatises, although such treatises are not admissible in evidence. *Tayl. on Ev.*

7 Vt. 158; *Goodwin's Case*, 5 Rog. Rec. 26. Where the opinion of an expert is offered, the court may hear evidence first to ascertain whether he is an expert, and then allow the opinion to be given in evidence. *Mendham's Case*, 6 Rand. 704. [The question whether witness is an expert is for the court, the judgment cannot be reviewed. *State v. Cole*, 94 N. C. 958. It is error to allow a witness to testify as an expert without showing his standing as a physician and upon what he founds his opinion. *Polk v. State*, 36 Ark. 117. A physician showing himself otherwise qualified is not incompetent because not in practice at the time of the occurrence to which he testifies. *Roberts v. Johnson*, 58 N. Y. 613.] A witness who has had opportunities of knowing and observing a person whose sanity is impeached, may not only depose to the facts he knows, but may also give his opinion or belief as to his sanity or insanity. *Clary v. Clary*, 2 Ired. Law, 78. [*United States v. Guiteau*, 10 Fed. Rep. 161; *Davis v. State*, 38 Md. 15; *Pigg v. State*, 43 Tex. 108. But see *State v. Coleman*, 27 La. An. 691.] On a question of insanity, witnesses other than professional men may state their opinion in connection with the facts on which it was founded. *Clark v. State*, 12 O. 483; *Norris v. State*, 16 Ala. 776. [Thomas v. State, 40 Tex. 60.] When witnesses give their opinions as to the sanity of a person, they must furnish the facts upon which their respective opinions are founded. *Walker v. Walker*, 14 Ga. 242; *Stewart v. Redditt*, 3 Md. 67; *Stewart v. Spedden*, 5 Id. 433; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Dorsey v. Warfield*, 7 Md. 65. Neither professional nor unprofessional witnesses can give an opinion as to mental capacity or condition, without first showing the facts upon which the opinion is founded. *White v. Bailey*, 10 Mich. 155. The opinions of witnesses not medical men may be received on a question of sanity. *Powell v. State*, 25 Ala. 21. [*State v. Erb*, 74 Mo. 199; *People v. Wreden*, 59 Cal. 392; *McClackey v. State*, 5 Tex. App. 320; *Webb v. State*, Id. 596; overruling, *Gehrke v. State*, 13 Tex. 568. And that certain spots were blood spots. *Greenfield v. People*, 85 N. Y. 75; *Thomas v. State*, 67 Ga. 460.] But a witness who is not a medical man is incompetent to express an opinion as to the particular species of fits with which any one is afflicted. *McLean v. State*, 16 Ala. 672. Who are experts, see *Page v. Parker*, 40 N. H. 47; *Johnson v. State*, 35 Ala. 370; *Commonwealth v. Rich*, 14 Gray, 335; *Howard v. Providence*, 6 R. I. 514; *Crane v. Northfield*, 33 Vt. 124; *Bricker v. Lighter*, 40 Pa. St. 199; *Pelamoures v. Clark*, 9 Ia. 1. The testimony of experts, as experts, cannot be received on subjects of general knowledge, familiar to men in general, and with which jurors are presumed to be acquainted. *Concord Railroad v. Greeley*, 3 Fost. 237. [*Commonwealth v. Collier*, 134 Mass. 203; but see *State v. White*, 76 Mo. 96; *Knoll v. State*, 55 Wis. 249; s. c. 42 Am. Rep. 704. A physician may testify as to the effect of powder marks when a pistol is fired at short range. The muslin used in his experiments may also be put in evidence. *Sullivan v. Commonwealth*, 93 Pa. St. 284; *People v. Morrigan*, 29 Mich. 4; *Gorham v. Gorham*, 41 Conn. 242. But see *Commonwealth v. Piper*, 120 Mass. 185. On presumptions from the course of a bullet: *Saunders v. State*, 37 Tex. 710.] A physician cannot be asked his opinion as an expert, as to whether a rape could have been committed in a certain way, if the question is not one which it requires professional knowledge to decide. *Cook v. State*, 4 Zab. 843. Medical men may be called by the government in a trial for murder, to give an opinion as to whether a beating which had been testified to by themselves or other witnesses, was an adequate cause of death. *Livingston's Case*, 14 Gratt. 592. [*Waite v. State*, 13 Tex. App. 169; *Banks v. State*, Id. 182; *People v. Kerrains*, 1 Thomp. & C. (N. Y.) 333; *Curry v. State*, 5 Neb. 412; *Lindsay v. People*, 63 N. Y. 143.] Evidence of scientific persons, on a capital trial, as to any distinction, evinced by scientific investigation, between the appearance of stains of human blood and those of animals, is properly admissible. *State v. Knights*, 43 Me. 11. An expert having heard the whole evidence given in a case is incompetent to give his opinion as to the effect of such evidence, but he may, upon a case hypothetically stated. *Luning v. State*, 1 Chand. 178; *State v. Howell*, 2 Hals. 244; *Lake v. People*, 1 Park. C. R. 495. [*State v. Bowman*, 98 N. C. 509; *Noonan v. State*, 55 Wis. 258; *Dejurnette v. Commonwealth*, 75 Va. 867. A physician may give his opinion founded on the testimony of others that deceased was dead before the accident. *State v. Clark*, 15 S. C. 403. A physician's evidence is impaired but not rendered inadmissible by the acknowledgment that he would not have concluded that death was caused by arsenical poisoning had he not been informed that there was arsenic in the house. *Mitchell v. State*, 58 Ala.

6th ed., p. 1230; and at all events a medical witness may be asked whether he has not in the course of his reading become acquainted with such and such results of scientific experience, and he may state that his judgment is founded in part on what he has read. *Collier v. Simpson*, 5 C. & P. 74, 24 E. C. L.

Where on an indictment for uttering a forged will, which together with the writings in support of such will, it was suggested, had been written over pencil marks which had been rubbed out, *Parke, B.*, (after consulting *Tindal, C. J.*.) held, that the evidence of an engraver who had examined the paper with a mirror, and traced the pencil marks, was admissible on the part of the prosecution, but that the weight of the evidence would depend upon the way in which it would be confirmed. *R. v. Williams*, 8 C. & P. 434, 34 E. C. L.

In proving the laws of foreign countries also, the opinions of competent witnesses are admissible. The law of a foreign state must be proved by the parol evidence of witnesses possessing professional skill. *Sussex Peerage*, 11 Cl. & Fin. 85, 114; *Nelson v. Lord Bridport*, 8 Beav. 527; but they may refresh their memories by referring to books and other legal documents, *Id.* Thus on the trial of the *Wakefields* for abduction, a gentleman of the Scotch bar was examined as to whether the marriage, as proved by the witness, would be a valid marriage according to the law of Scotland. *R. v. Wakefield*, 2 Lewin, C. C. 1, 279; 2 Deac. Dig. C. C. 4. See also *Dalrymple v.*

417; *Davis v. State*, 38 Md. 15. A physician cannot testify as an expert on the damages resulting from a failure to keep a contract not to practice within a specified time. *Linn v. Sigbee*, 67 Ill. 75. A physician cannot testify as to whether certain domestic troubles are sufficient to cause insanity. *Carter v. State*, 56 Ga. 463. He may testify as to the skill of another physician where his knowledge is derived from personal observation. *Laros v. Commonwealth*, 84 Pa. St. 200.] Experts are not allowed to give their opinion on the case, when its facts are controverted, but counsel may put to them a state of facts, and ask their opinion thereon. *United States v. McGlue*, 1 Curt. C. C. 1; *Daniels v. Musher*, 2 Mich. 183. [*Brown v. Commonwealth*, 14 Bush, (Ky.) 398; *State v. Cole*, 94 N. C. 953.] The opinions of experts upon questions of art or science, to be admissible as evidence, must always be predicated of the facts established by the proof in the case. *Champ v. Commonwealth*, 2 Metc. (Ky.) 17. [*Newton v. State*, 21 Fla. 53; *Ballard v. State*, 19 Neb. 609.] A medical witness may be asked his opinion on a hypothetical statement of facts. *Reed v. People*, 1 Park. C. R. 481. [But where the question is on a particular disease, the physician must have made a specialty of it. *Russell v. State*, 53 Miss. 368. A physician who has testified as to the treatment of the deceased may be cross-examined as to the effect of the medicines, etc. *Batten v. State*, 80 Ind. 394. A physician who was present at the autopsy may testify as to the injuries received. *Commonwealth v. Piper*, 120 Mass. 185. But under the New York statute he cannot give his opinion as an expert founded on the evidence of confidential communications. *People v. Murphy*, 4 N. Y. Crim. Rep. 95. Nor can he testify as to a doubt whether the prisoner is sane. *Sanchez v. People*, 22 N. Y. 147.] When in a trial for poisoning, circumstantial evidence is relied on, chemical analysis of the contents of the stomach and bowels should always be made. *Joe v. State*, 6 Fla. 591. Neither books of established reputation on the subject of insanity, nor statistics of the increase of insanity, can be read to the jury. *Commonwealth v. Wilson*, 1 Gray, 337; *Melvin v. Basley*, 1 Jones's Law, 386. [See 1 *Greenleaf on Evidence*, § 440 (n), 13th ed., and cases cited; *Davis v. State*, 38 Md. 15.] Medical witnesses, in giving their opinions as experts, are not confined to the results of their own observation and experience, but may give opinions upon information derived from books. *State v. Terrell*, 12 Rich. Law, 321. *S. State v. Wood*, 53 N. H. 484. They can be cross-examined as to their knowledge of standard authorities. *Hutchinson v. State*, 19 Neb. 262.

Dalrymple, 2 Hagg. Cons. 54; *R. v. Povey*, 22 L. J., M. C. 19. So it is laid down by a foreign writer of eminence, that foreign unwritten laws, customs, and usages, may be proved, and, indeed, must ordinarily be proved, by parol evidence. The proper course is to make such proof by the testimony of competent witnesses instructed in the law, under oath.¹ *Sussex Peerage case*, 11 Cl. & Fin. 115; *Cocks v. Purday*, 2 C. & Kir. 269, 61 E. C. L.

¹ *Talbot v. Seamen*, 1 Cr. 12, 38; *Church v. Hubbert*, 2 Id. 236; *Strother v. Lucas*, 6 Pet. 763; *Consequa v. Willing et al.*, Pet. C. C. 225; *Seton v. Delaware Ins. Co.*, 2 Wash. C. C. 175; *Robinson v. Clifford*, Id. 1; *Hill v. Packard*, 5 Wend. 375; 2 Id. 411; *Raynham v. Canton*, 3 Pick. 293; *Bruchett v. Norten*, 4 Conn. 517; *Hempstead v. Reed*, 6 Conn. 430; *Tarleton v. Briscoe*, 4 Bibb, 73; *Talbot v. David*, 2 Marsh. 609; *Baptiste et al. v. Devalanbrun*, 2 H. & J. 86; *Kenny v. Clarkson*, 1 Johns. 385; *Woodbridge v. Austin*, 2 Tyl. 367; *Firth v. Sprague*, 14 Mass. 455; *Smith v. Elder*, 3 Johns. 145; *Denison v. Hyde*, 6 Conn. 503; *Middlebury College v. Cheney*, 1 Vt. 336; *McRae v. Mattoon*, 13 Pick. 53; *Dyer v. Smith*, 12 Conn. 384; *Owen v. Boyle*, 15 Me. 147; *Ingraham v. Hart*, 11 O. 255; *Phillips v. Grigg*, 10 W. 158. It lies on the party objecting to parol proof to show that the law is written. *Dougherty v. Snyder*, 15 S. & R. 87; *Newsome v. Adams*, 2 La. 153; *Taylor v. Swell*, 3 Id. 43; *Livingston v. Maryland Ins. Co.*, 6 Cr. 274. The court, on the trial of a cause, may proceed on their knowledge of the laws of another State, and it is not necessary, in that case, to prove them, and their judgment will not be reversed when they proceed on such knowledge, unless it appear that they decided wrong as to those laws. *State v. Rood*, 12 Vt. 396. In the trial of an action by jury, when the claim or defence of a party depends on the construction of a statute of another State, the question of the construction of the statute in that State is to be decided by the jury. *Holman v. King*, 7 Metc. 384. A volume of the laws of another State, purporting to be published by its authority, and proved by a counsellor in that State to be cited and received in the courts there, is competent evidence. *Lord v. Staples*, 3 Fost. 448; *Emery v. Berry*, 8 Id. 473; *Dixon v. Thatcher*, 14 Ark. 141; *Charlesworth v. Williams*, 16 Ill. 338; *State v. Abbey*, 3 Williams, 60; *Stanford v. Pruet*, 27 Ga. 243; *Yarborough v. Arnold*, 20 Ark. 592; *Memfield v. Robbins*, 8 Gray, 150. It is necessary that the seal of the State should be affixed to the exemplification of a statute. *Wilson v. Lazier*, 11 Gratt. 477; *Sisk v. Woodruff*, 15 Ill. 15. The national seal affixed to the exemplification of a foreign law or judicial proceeding, proves itself. *Watson v. Walker*, 3 Forst. 471. The statute law of other States must be proved by the statute itself, and not by parol. The common, customary, or unwritten law, may be proved by witnesses acquainted with the law. *McNeill v. Arnold*, 17 Ark. 154; *Charlotte v. Chouteau*, 25 Mo. 465. The testimony of an attorney-at-law of another State, is not legal evidence of the statute law of that State. *Smith v. Potter*, 1 Williams, 304; *Martin v. Payne*, 11 Tex. 292. If the statutes of a sister State need explanation, the testimony of one learned in the law can alone be received. *People v. Lambert*, 5 Mich. 349. The practice and usage under the written law or statute of another State, may be proved by parol. *Greason v. Davis*, 9 Ia. 219. Statutes of sister States cannot be proved by parol, but as to the mode of proving foreign laws the court has a discretion. *Line v. Mack*, 14 Ind. 330; *Davis v. Rogers*, Id. 424. As to foreign laws, see *Hooper v. Moore*, 5 Jones's Law, 130; *Drake v. Glover*, 30 Ala. 382. Foreign laws are not judicially noticed, but presumed to be like our own. *Woodrow v. O'Connor*, 2 Williams, 776; *Bear v. Briggs*, 4 Ia. 464. The written or statute laws of a foreign government must be authenticated by the exemplification of a copy under the great seal of State or by a sworn copy. Unwritten laws may be shown by parol evidence. Witnesses to be competent to prove unwritten laws, must be instructed in them. *Watson v. Walker*, 3 Fost. 471; *Pickard v. Bailey*, 6 Id. 152. In the absence of proof, the courts presume foreign laws to be the same as the laws of the forum. *Rape v. Heaton*, 9 Wis. 328; *Cox v. Morrow*, 14 Ark. 603. The unwritten law of another State is to be proved by experts. *Greason v. Davis*, 9 Ia. 219. The courts of one State will not take judicial notice of the laws of a sister State, but they must be proved as facts. *Taylor v. Boardman*, 25 Vt. 581. *Contra*, *Herschfeld v. Drexel*, 12 Ga. 582. Where the rights in controversy accrued in a State where the common law is in force, the court will take notice of the principles of the common law, including equity, which apply to the case. *Nimmo v. Davis*, 7 Tex. 26; *Warren v. Lusk*, 16

Mo. 102. The court will judicially presume that the common law is the rule of decision in other States, unless the contrary is shown. *Reese v. Harris*, 27 Ala. 301; *Thompson v. Monrow*, 2 Cal. 99. [Compare *supra*, p. *16 n. and cases cited.] The legal presumption is that the common law of a sister State is similar to that of our own. *Pomeroy v. Ainsworth*, 22 Barb. 118; *Houghtaling v. Ball*, 19 Mo. 84. *Bradshaw v. Mayfield*, 18 Tex. 21; *Brimhall v. VanCampen*, 8 Minn. 13; *Connor v. Travick*, Shep. Sel. Cas. 258, 37 Ala. 289; *Savage v. O'Neil*, 44 N. Y. 298; *Mendenhall v. Gately*, 18 Ind. 149; *Crake v. Crake*, 18 Id. 156; *Buckingham v. Gregg*, 19 Id. 401; *Hickman v. Alpaugh*, 21 Cal. 225; *Palfrey v. Portland Railroad Co.*, 4 Allen, 55. Foreign statutes cannot be proved by parol, without some showing why secondary evidence becomes necessary. *Kermott v. Ayer*, 11 Mich. 181. A copy of an act of the legislature of another State cannot be properly authenticated without having affixed to it the seal of the State. *Commonwealth Ins. Co. v. Labuzan*, 15 La. An. 295. A printed copy of the statute laws of another State, passed at a single session of the legislature and purporting to be published by authority of the government, is admissible in evidence. *Ashley v. Root*, 4 Allen, 504. A volume purporting to be the laws in force at a certain date in another State, printed "by authority" and by the "State printer," may be admitted in evidence as *prima facie* the law of that State. *Crake v. Crake*, 18 Ind. 156. Upon the question of the existence of a foreign law, it is proper to read to the jury from printed books of decisions and history. *Charlotte v. Chouteau*, 33 Mo. 194. S.

*PRIVILEGE OF WITNESSES.

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Nature of privilege. We have already considered what questions may be put to a witness ; every such question the witness is bound to answer, unless he can show that he is privileged from so doing, from some peculiarity in his situation.

There is a great difference between privilege and incompetency, though the difference has not always been kept in view. An incompetent witness cannot be examined, and, if examined inadvertently, his testimony is not legal evidence ; but a privileged witness may always be examined, and his testimony is perfectly legal if the privilege be not insisted on.

If a witness be compelled to answer in cases where he claims and ought to have been allowed his privilege, that is not a ground for reversing a conviction upon complaint of a party to the suit, as the only person injured is the witness. *R. v. Kinglake*, 11 Cox, C. C. (Q. B.) 499.

The privilege of a witness arises in three ways : first, on the ground that to answer the question would expose him to consequences so injurious that he ought to be allowed to decline doing so ; secondly, that to answer the question would be a breach of confidence, which he ought not to be forced to commit ; thirdly, that to compel the witness to answer the question would be against public policy.

When the witness is privileged on the ground of injurious consequences of a civil kind. It has generally been considered that a witness is privileged from answering any question, the answer to which might *directly subject him to forfeiture of estate.¹ [*150]

¹ A witness may be compelled to testify against his pecuniary interest. *Quinlan v. Davis*, 6 Whart. 169. A witness may be compelled to give testimony, the tendency of

Forfeiture is now abolished except as to outlawry (see 33 & 34 Vict. c. 23, s. 1). And it is considered by Mr. Phillips (2 Phill. Ev. 492, 10th ed.), that the existence of this rule is impliedly recognized by the 46 Geo. 3, c. 87, which, after reciting that "doubts had arisen whether a witness could by law refuse to answer a question relevant to the matter in issue, the answering of which had no tendency to accuse himself, or to expose him to any *penalty or forfeiture*, but the answering of which might establish, or tend to establish that he owed a debt, or is otherwise subject to a civil suit at the instance of his majesty or of some other person or persons," it was declared and enacted, "that a witness cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to accuse himself and to expose him to a *penalty or forfeiture* of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or any other person or persons."

It will be seen that this statute also excepts cases where the witness is exposed to a *penalty*. A doubt might arise whether this exception extends to penalties to be recovered by a common informer, or otherwise in a civil manner. In none of the reported cases since the statute does the question seem to have arisen, nor is there any very clear indication of what was considered to be the law before the passing of the above statute; the question therefore remains yet to be discussed.

When witness is privileged on the ground of injurious consequences of an ecclesiastical kind. Questions subjecting a witness to ecclesiastical penalties have been generally considered as coming within those which he is entitled to decline answering, as under the 2 & 3 Edw. 6, c. 13, s. 2, for not setting out tithes. *Jackson v. Benson*, 1 Y. & J. 32; on a charge of simony, *Brownwood v. Edwards*, 2 Ves. Sen. 244; or incest, *Chetwynd v. Lindon*, Id. 403.

But there cannot be a doubt that a judge, in deciding whether or not a witness is entitled to the privilege, would consider whether the danger suggested by the witness was real and appreciable; *R. v. Boyes*, *infra*, p. 151; and the mere chance of an obsolete jurisdiction being set in motion would very likely not be considered as entitling the witness to his privilege.

which may be to subject him to pecuniary loss. *Ward v. Sharp*, 15 Vt. 115. That a mere civil inability does not render the witness incompetent, see *Gorham v. Carroll*, 5 Litt. 221; *Black v. Crouch*, Id. 226; *State v. McDonald*, 1 Cox, 332; *Stoddart's Lessee v. Manning*, 2 H. & J. 147; *Bull v. Loveland*, 10 Pick. 9; *Baird v. Cochran*, 4 S. & R. 397; *Nass v. Swearingen*, 4 S. & R. 192; *Copp v. Upham*, 3 N. H. 159; *Hays v. Richardson*, 1 G. & J. 316; *Naylor v. Simmes*, 7 Id. 273; *Commonwealth v. Thruston*, 7 J. J. Marsh. 63; *Taney v. Kemp*, 4 H. & J. 348; *Planters' Bank v. George*, 6 Mart. 679, *overruling* *Navigation Co. v. New Orleans*, 1 Mart. 28. *Contra*, *Benjamin v. Hathaway*, 3 Conn. 528; *Storrs v. Wetmore*, Kirby, 203; *Starr v. Tracey et al.*, 2 Root, 528; *Cook v. Corn*, 1 Over. 240; and see *Mauran v. Lamb*, 7 Cow. 174. A witness is compellable to produce a paper, though it may subject him to pecuniary loss. *Bull v. Loveland*, 10 Pick. 9. S.

When witness is privileged on the ground of injurious consequences of a criminal kind. That the witness will be subjected to a criminal charge, however punishable, is clearly a sufficient ground for claiming the protection.¹ Thus a person could not be compelled to confess himself the father of a bastard child, as he was thereby subjected to the punishment inflicted by the 18 Eliz. c. 3, s. 2 (repealed); *R. v. St. Mary, Nottingham*, 13 East, 58 (n). So a witness cannot be compelled to answer a question which subjects him to the criminal consequences of usury; *Cates v. Hardacre*, 3 Taunt. 424. And if a witness was improperly compelled, after objection taken by him, to answer questions tending to criminate him, it would appear that such answers would not be admissible in evidence against him should he be subsequently tried on a criminal charge. *R. v. Coote*, L. R. 4 P. C. 599; 42 L. J. Pr. C. 45, *ante*, p. 60. But if the time limited for the recovery of the *penalty have expired, the witness may be compelled to answer. [*151 *Roberts v. Allatt, M. & M.* 192.

Whether or no a witness who has been pardoned is bound to answer questions which tend to show him guilty of the offence for which the pardon has been granted, is perhaps doubtful. The question appears to have been decided in the negative by North, C. J., in *R. v. Reading*, 7 How. St. Tr. 226; but that case has been much doubted. See *Moo. & M. N. P. C.* 193 (n), and in *R. v. Boyes*, 1 B. & S. 311, it was held by the Court of Queen's Bench that a pardon took away the privilege of the witness in such a case.

In the case last mentioned an objection was taken on behalf of the witness that though a pardon under the great seal might be a protection in ordinary cases, yet that under the peculiar circumstances of that case it was not so. The prosecution was for bribery, and the question put to the witness was objected to by him, on the ground that its answer would tend to show that he had received a bribe. A pardon under the great seal was thereupon handed to him by the solicitor-general, who was prosecuting for the crown, but the witness still refused to answer, on the ground that, inasmuch as by the express provisions of the 12 & 13 Will. 3, c. 2 (repealed), the pardon would not be pleadable to an impeachment for bribery by the House of Com-

¹ *United States v. Craig*, 4 Wash. C. C. 229; *Southard v. Rexford*, 6 Cow. 254; *Grannis v. Brandon*, 5 Day, 260; *People v. Herrick*, 13 Johns. 82; *Ward v. People*, 3 Hill, 395, 6 Hill, 144; *Cloyes v. Thayer et al.*, 3 Hill, 564; *Warner v. Lucas*, 10 O. 336; *Low v. Mitchell*, 18 Me. 372; *Poindexter v. Davis*, 6 Gratt. 451; *Janvrin v. Scammon*, 9 Fost. 280; *Coburn v. Odell*, 10 Fost. 540; *Pleasant v. State*, 15 Ark. 624; *State v. Bilansky*, 3 Minn. 246; *People v. Kelley*, 10 Smith, 74; *Printz v. Cheeney*, 11 Ia. 469. It is proper to ask a question, the answer to which may criminate the witness, as he may answer it, and the court will carefully instruct the jury that the refusal to answer gives rise to no inference of guilt. *Newcomb v. State*, 37 Miss. 383. [The privilege must be claimed. If the witness does not object there is no reason why he should not be allowed to testify. *Howell v. Parish*, 26 La. An. 6.] When a witness was asked, on cross-examination, whether he had not been convicted and punished for an infamous crime, and the judge allowed the witness to elect whether he would answer, and he refused, it was held, that such refusal might be insisted on by counsel, in addressing the jury, as warranting the inference that he was unworthy of credit. *State v. Garrett*, Busb. Law, 357. *Contra*, *Phelin v. Kenderdine*, 20 Pa. St. 354. S.

mons, the privilege still existed; but the Court of Queen's Bench held that the danger to be apprehended must be real, and appreciable; and that an impeachment by the House of Commons for bribery was, under the circumstances, too improbable a contingency to justify the witness in still refusing to answer on that ground.

By the Corrupt Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 59, persons called as witnesses before any election court, or before election commissioners, are not excused from answering; but if they answer every question, they are to receive a certificate, which will be a bar to all proceedings against such persons for any offences under the Corrupt Practices Prevention Acts, and no answer shall, except in the case of any criminal proceedings for perjury be admissible in evidence in any proceeding, civil or criminal. By the interpretation clause of the same Act, s. 64, the word "indictment" includes "information." This interpretation was inserted to meet the case of *R. v. Slater*, 8 Q. B. D. 267; 51 L. J., Q. B. D. 246; and the words "any criminal proceedings" seem to get rid of the objection raised in *R. v. Buttle*, L. R., 1 C. C. R. 268; 39 L. J., M. C. 115, where it was held that answers given before a commission could not be used on a trial for perjury committed at the trial of an election petition.

Similar provisions are applied to the case of witnesses examined in respect of any offence against the law relating to explosive substances as contained in the Explosive Substances Act, 1883 (46 Vict. c. 3), s. 6.

As to compelling witnesses to answer in cases of bankruptcy, and fraudulent agents, bankers, etc., see *post*, p. 161.

Right to decline answering—how decided. Of course the judge is to decide whether or not the witness is entitled to the privilege, subject to the correction of a superior court.¹ What inquiries he ought to

¹ The witness and not the court is the proper judge whether a question put to him has a tendency to criminate. *State v. Edwards*, 2 N. & McC. 13. The court will instruct him to enable him to determine, and if the answer form one link in a chain of testimony against him he is not bound to answer. *Id.* The following principles were laid down by C. J. Marshall, in *Burr's Trial*:

It is the province of the court to judge whether any direct answer to the questions, which may be proposed will furnish evidence against the prisoner. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be, and if he say on oath he cannot answer without accusing himself he cannot be compelled to answer. 1 *Burr's Trial*, 245; *Parkhurst v. Lowton*, 3 Swanst. 215. The witness (with the instruction of the court when necessary) must decide when his answer will tend to criminate him, and his decision is upon oath and at the peril of perjury. *Poole v. Peritt*, 1 Sp. 123. A witness who declines to answer, on the ground that the answer sought may tend to criminate him, must state under oath that he believes that would be the tendency of the answer. And after that answer it is for the court to decide whether the question will have that tendency. *Kirschner v. State*, 9 Wis. 140. If a witness is exempt, by statute, from liability for any offence of which he is compelled to give evidence, or if the offence, as to him, is barred by the statute of limitations, he cannot claim the privilege of not answering ordinarily incident to such a case. *Floyd v. State*, 7 Tex. 215. If a statute provides that what a witness testifies shall not be given in evidence against him, his privilege is gone. *People v. Kelley*, 10 Smith, 74. One of two persons concerned in

make in order to satisfy himself upon this point has been the subject of considerable difference of opinion. In *Fisher v. Ronalds*, 12 C. B. 762, it was unnecessary to decide the point, but Maule, J., said, "it is for the witness to exercise his discretion, not the judge. The [*152 witness might be asked, 'Were you in London on such a day?' and though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission would complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him." It was equally unnecessary to decide the point in *Osborne v. The London Dock Company*, 10 Ex. R. 701, but the question was a good deal discussed, the opinion of Parke, B., clearly inclining to the view that the witness ought to satisfy the court that the effect of the question will be to endanger him. The learned baron states that this was the opinion of the majority of the judges who considered the case of *R. v. Garbett*, 1 Den. C. C. 236, though they expressly refrained from deciding the point; and he also cites the opinion of Lord Truro, who in the case of *Short v. Mercier*, 3 Mac. & Y. 205, said, "A defendant, in order to entitle himself to protection, is not bound to show to what extent the discovery sought might affect him, for to do that he might oftentimes of necessity deprive himself of the benefit he is seeking; but it will satisfy the rule if he states circumstances consistent on the face of them with the existence of the peril alleged, and which also render it extremely probable." In *Sidebottom v. Atkyns*, 3 Jur. N. S. 631, Stuart, V. C., compelled a witness to answer questions although he swore that he should thereby subject himself to a criminal prosecution. In *Adams v. Lloyd*, 3 Hurlst. & Nor. 351, Pollock C. B., admits the right of the judge to use his discretion, but seems to think that he ought to be satisfied by the oath of the witness, if there are no circumstances in the case which lead him to doubt the real necessity for protection. In the last case on the subject, *R. v. Boyes*, *supra*, p. 151, the Court of Queen's Bench, after consideration, held that "to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer." The rule in this case may be taken to be well established, and it has been adopted by the Court of Appeal in *Ex parte Reynolds*, 20 Ch. D. 294; 51 L. J. Ch. D. 756.

It will thus be seen that in all cases where the point has directly arisen, it has been held that the bare oath of the witness, that he is endangered by being compelled to answer, is not to be considered as

the commission of a crime may be compelled to testify against the other when a statute provided that "the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence." *State v. Quailles*, 8 Eng. 307. 8.

necessarily sufficient: but that the judge is to use his discretion whether he will grant the privilege or not. Of course the witness must always pledge his oath that he will incur risk, and there are innumerable cases in which a judge would be properly satisfied with this without further inquiry, but if he is not satisfied, he is not precluded from further investigation.¹

Questions tending to degrade a witness. It is submitted that there cannot, by any possibility, be any doubt as to the rule upon this subject. Every question must be answered by a witness, whether it tend to degrade him or not, if it be material to the issue, unless it tend to render him liable to penalties and punishment. As the credibility of a witness is always in issue, he must, therefore, answer questions which are in no other way material than as affecting his *credibility. On the other hand, every question which is not *153] material to the issue is improper; and it is not only improper, but unbecoming, to put questions to a witness, the very putting of which tends to degrade him, and which, not being material, he cannot be compelled to answer. And as every witness is entitled to the protection of the court in which he appears, any attempt to degrade him unnecessarily will immediately be repressed, without waiting for the witness to object to the question.²

¹ The rule that a witness is not obliged to criminate himself is well established. But this is a privilege which may be waived; and if the witness consents to testify in one manner tending to criminate himself, he must testify in all respects relating to that matter so far as material to the issue. If he waives the privilege, he does so fully in relation to that act; but he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue. *Low v. Mitchell*, 18 Me. 372. A witness is not bound to testify to any matter which will tend, in any manner, to show him guilty of a crime or liable to a penalty. *Chamberlain v. Willson*, 12 Vt. 491. If the witness understandingly waive his privilege and begin to testify, he must submit to a full cross-examination if required. The witness must first determine whether he will claim the privilege, and if the privilege is claimed upon oath, the court cannot deny it, unless fully satisfied that the witness is mistaken, or acts in bad faith. *Id.* See *State v. K.*, 4 N. H. 562. If a witness, knowing that he is not bound to testify concerning a fact which may tend to criminate, voluntarily answers in part, he may be cross-examined as to the whole transaction. *Foster v. Pierce*, 11 Cush. 437; *People v. Carroll*, 3 Park. C. R. 73; *Commonwealth v. Howe*, 13 Gray, 26. It is the privilege of the witness, not of the party, that the witness need not testify to facts which will subject him to a criminal prosecution. If he waives his privilege and testifies to part of a transaction, in which he was criminally concerned, he is bound to state the whole. *State v. Foster*, 3 Fost. 348; *Floyd v. State*, 7 Tex. 215. When a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on the subject, even though his answers may criminate or disgrace him. *Norfolk v. Gaylord*, 28 Conn. 309. *S. State v. Fay*, 43 Ia. 651.

² A witness is not bound to give answers which may stigmatize or disgrace him. *State v. Bailey*, 1 Penn. 415; *Vaughan v. Perine*, 2 Id. 628; *Baird v. Cochran*, 4 S. & R. 400; *Resp v. Gibbs*, 3 Y. 429, 437; *Galbraith v. Eichelberger*, Id. 515; *Bell's Case*, 1 Browne, 376; *Salsonstall's Case*, 1 Rog. Rec. 134; *Stout v. Russell*, 2 Y. 334; *People v. Herrick*, 13 Johns. 82. [But see *People v. Manning*, 48 Cal. 335; *State v. Gay*, 94 N. C. 814. A witness may be impeached by asking him if he has been confined in prison for crime. *Lights v. State*, 21 Tex. App. 308.] A witness is not bound to answer any questions which may impeach his conduct as a public officer. *Jackson v. Humphrey*, 1 Johns. 498; *Marbury v. Madison*, 1 Cr. 144. A witness on cross-exami-

By 28 Vict. c. 18, s. 6, a witness may be questioned as to whether he has been convicted of any felony or misdemeanor. See the section, *post*, p. 166.

Privilege of husband and wife. A doubt has arisen whether the principle of law which considers husband and wife as one person, extends to protect persons who stand in that relation to each other from answering questions which tend to criminate either, even although they are neither of them upon trial, or in a situation in which the evidence can be used against them. It was indeed, at one time, held that a husband or wife was an incompetent witness to prove any fact which might have a tendency to criminate the other. *R. v. Cliviger*, 3 T. R. 263; but that decision is no longer law; all the subsequent cases, with one exception, treat the husband or wife as a competent witness under such circumstances; *R. v. All Saints, Worcester*, 6 M. & S. 194; *R. v. Bathwick*, 2 B. & Ad. 639, 22 E. C. L.; *R. v. Williams*, 8 C. & P. 284, 34 E. C. L. The case the other way is that of *R. v. Glead*, 3 Russ. Cri. 623, 5th ed., in which, on a charge of stealing wheat, Taunton, J., after consulting Littledale, J., refused to allow a wife to be called in order that she might be asked whether her husband, who had absconded, was not present when the wheat was stolen; but that case would hardly prevail against the two decisions of the Court of Queen's Bench, above referred to. In the well-known prosecution against Thurtell, Mrs. Probert, whose husband had been previously acquitted, was the principal witness, and the evidence does not even seem to have been objected to. See *per Alderson, B.*, in *R. v. Williams*, *ubi supra*. Husband and wife are now competent witnesses for and against one another in certain cases. See *ante*, p. 129.

But though the husband or wife be competent, it seems to accord with principles of law and humanity that they should not be compelled to give evidence which tends to criminate each other; and in *R. v. All Saints, Worcester*, *supra*, Bayley, J., said that if in that case the witness had thrown herself on the protection of the court on the ground that her answer to the question put to her might criminate her husband, he thought she would have been entitled to the protection of the court. A similar opinion is expressed in 1 Phill. & Arn. Ev. 73, 10th ed.; and see *Cartwright v. Green*, 8 Ves. 405. By the 16 & 17 Vict. c. 83, s. 3, "No husband shall be compelled to disclose any communication made by him by his wife during the marriage," and *vice versa*; see *O'Connor v. Majoribank*, 4 M. & Gr. 435, 43 E. C. L.; see *ante*, p. 126.

Of course, if the husband or wife have been already convicted, acquitted, or pardoned, there will be no ground for claiming the privilege. *R. v. Williams*, *supra*.¹

nation was asked, "Do your neighbors call you lying Josh?" held that the question was inadmissible. *Nerson v. Henderson*, 3 Fost. 498. 8.

Under the Georgia code, a witness need not testify to facts which degrade him. *Gravett v. State*, 74 Ga. 191.

¹ Under the Iowa code a wife is permitted to testify for her husband in a criminal case; and her credibility is to be tested by the same rules which apply to all other wit-

When the witness is privileged on the ground of confidence. The *154] matters with respect to which the privilege of secrecy exists on the ground of confidence are those which have come to the knowledge of the witness's professional legal adviser.¹ *Wilson v. Rastall*, 4 T. R. 758; *Duchess of Kingston's case*, 20 How. St. Tr. 575. Other professional persons, whether physicians, surgeons, or clergymen, have no such privilege.² *Id.* Thus where the prisoner, being a Roman Catholic, made a confession before a Protestant clergyman, that confession was permitted to be given in evidence at the trial, and he was convicted and executed. *R. v. Sparke*, cited, *Peake*, N. P. C. 78. Upon this case being cited, Lord Kenyon observed, that he should have paused before he admitted the evidence; but there appears to be no ground for this doubt. In *R. v. Gilham*, Ry. & M. C. C. R. 198, it was admitted by the counsel for the prisoner, that a clergyman is bound to disclose what has been revealed to him as matter of religious confession; and the prisoner in that case was convicted and executed.

A person who acts as interpreter between a client and his attorney, will not be permitted to divulge what passed; for what passed through the medium of an interpreter is equally in confidence as if said directly to the attorney; but it is otherwise with regard to conversation between the interpreter and the client in the absence of the attorney. *Du Barre v. Livette*, *Peake*, N. P. C. 108; 4 T. R. 756; 20 How. St. Tr. 575

nesses. It is error for the court to instruct the jury that it should be examined with caution or peculiar care. *State v. Guyer*, 6 Ia. 263; *State v. Rankin*, 8 Ia. 355; *State v. Bernard*, 45 Ia. 234. The statutes restoring competency to a husband or wife do not deprive them of the right to claim the privilege. *State v. McCord*, 8 Kan. 232.

¹ *Mills v. Griswold*, 1 Root, 383; *Id.* 486; *Holmes v. Komegys*, 1 Dall. 439; *Corp. v. Robinson*, 2 Wash. C. C. 383; *Hoffman et al. v. Smith*, 1 Caines, 157; *Calkin v. Lee*, 2 Root, 363; *Sherman v. Sherman*, 1 Id. 486; *Caveney v. Tannahill*, 1 Hill, 33; 2 Stark. Ev. new ed. 229, n. 1. To exclude the testimony of an attorney, it is not necessary that there should be a suit pending. *Beltzhoover v. Blackstock*, 3 W. 20. It is sufficient if the witness were consulted professionally and acted or advised as counsel. *Id.* *Foster v. Hall*, 12 Pick. 89; *Johnson v. Bank*, 1 Harring. 117; *Rogers et al. v. Daw*, *Wright*, 136. What the law means by privileged communications, are instructions for conducting the cause, not any extraneous or impertinent communications. *Riggs v. Denniston*, 3 Johns. Cases, 198. To exclude the communications of client to counsel from being given in evidence, it is not necessary that they should have been given under any injunction of secrecy. *Wheeler v. Hill*, 16 Me. 329. S.

The privilege does not cease to operate because a friend was present at the interview. *Bowers v. State*, 29 Ohio St. 542. But see *contra*. *People v. Barker*, 8 Crim. Law. Mag. 61.

² A confession made to a Roman Catholic priest is not evidence. *Smith's Case*, 1 Rog. Rec. 77. *Contra*, per Gibson, C. J., in *Phillips' Ex. v. Gratz*, 2 P. & W. 417. But confessions to a Protestant divine are not privileged. *Smith's Case*, *supra*; *Commonwealth v. Drake*, 15 Mass. 161. [Where statutes have been passed protecting confessions made to a clergyman in his professional character the communication to be privileged must be made in the course of religious discipline. *Gillooley v. State*, 58 Ind. 182. A statute which grants protection to medical men, does not shield them from examination as to *post mortem* inquiries. *Summers v. State*, 5 Tex. App. 366. The New York statute as to confidential communications with a physician applies to criminal actions. It is for the benefit of the patient, however, not of the criminal. *People v. Murphy*, 4 N. Y. Crim. Rep. 95; *People v. Stout*, 3 Park. (N. Y.) 670; *Pierson v. People*, 79 N. Y. 424.] See *Phillip's Case*, *Sampson's Roman Catholic Questions in America*, Pamphlet. S.

(n). So the agent of the attorney stands in the same situation as the attorney himself. *Parkins v. Hawkshaw*, 2 Stark, N. P. C. 239, 3 E. C. L.; *Goodall v. Little*, 20 L. J., Ch. 132. So a clerk to the attorney. *Taylor v. Foster*, 2 C. & P. 195, 12 E. C. L.; *R. v. Inhabitants of Upper Boddington*, 8 D. & R. 726. So a barrister's clerk; *Foot v. Hayne*, Ry. & Moo. 165.¹

Although some doubt has been entertained, as to the extent to which matters communicated to a barrister or an attorney in his professional character are privileged, where they do not relate to a suit or controversy either pending or contemplated, and although the rule was attempted to be restricted, by Lord Tenterden, to the latter cases only; see *Clark v. Clark*, 1 Moody & Rob. 3; *Williams v. Mundy*, Ry. & Moo. 34; yet it seems to be at length settled, that all such communications are privileged, whether made with reference to a pending or contemplated suit or not. See all the cases commented upon by the L. C. in *Greenough v. Gaskell*, 1 Myl. & K. 100. See also *Walker v. Wildman*, 6 Madd. 47; *Mynn v. Joliffe*, 1 Moo. & Ry. 326; *Moore v. Tyrrell*, 4 B. & Ad. 870, 24 E. C. L. As to when the client may be compelled by bill in equity to disclose communications made before any dispute arose, see *Taylor on Ev.*, 6th ed., pp. 823, 824.

A communication made to a solicitor, if confidential, is privileged in whatever form made, and equally when conveyed by means of sight instead of words. Thus an attorney cannot give evidence as to the destruction of an instrument which he has been admitted in confidence to see destroyed. *Robinson v. Kemp*, 5 Esp. 54. See *post*.

The rule applies not only to the professional advisers of the parties in the case, but also to the professional advisers of strangers to the inquiry. Thus an attorney is not at liberty to disclose what is communicated to him confidentially by his client, although the latter be not in any shape before the court. *R. v. Wither*, 2 Camp. 578.

A communication in writing is privileged, as well as a communication by parol; and deeds and other writings deposited with an *attorney in his professional capacity, will not be allowed to be [*155 produced by him.

To prove the contents of a deed, the defendant's counsel offered a copy, which had been procured from the attorney of a party under whom the plaintiff claimed, but Bayley, J., refused to admit it. He said, "The attorney could not have given evidence of the contents of the deed, which had been entrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or a verbal communication."² It is the privilege of his client, and continues from first to last." *Fisher v. Heming*, 1 Phill. Ev. 116, 10th ed. But see

¹ *Jackson v. French*, 2 Wend. 337; but not a student in his office. *Andrews et al. v. Solomon et al.*, Peters C. C. Rep. 356. S.

² *Anon.*, 8 Mass. 270; *Brandt v. Klein*, 17 Johns. 335; *S. P. Jackson v. McVey*, 18 Id. 330; *State v. Squires*, 1 Tyler, 147; *Lessee of Rhodes v. Solin*, 4 Wash. C. C. Rep. 715. S.

Cleave v. Jones, 21 L. J., Ex. 105, 7 Exch. 421, *supra*, and *Lloyd v. Mostyn*, 10 M. & W. 481, 482, where Parke, B., questions the correctness of the decision in *Fisher v. Heming*. In *Volant v. Soyer*, 13 C. B. 231, 76 E. C. L.; 12 Law J., C. P. 83, an attorney refused to produce a document on the ground that it was his client's title deed; he was then asked what the deed was, but the judge disallowed the question, and refused also to examine the deed; the court held, that he was right. Nor where an attorney holds a document for a client can he be compelled to produce it, by a person who has an equal interest in it with his client; *Newton v. Chaplin*, 10 C. B. 356, 70 E. C. L.

The information must have been obtained by the legal adviser in his professional capacity. Thus an attorney, who has witnessed a deed produced in a cause, may be examined as to the true time of execution; or if a question arise as to a rasure in a deed or bond, he may be asked whether he ever saw the instrument in any other state, that being a fact within his own knowledge; but he ought not to be permitted to discover any confession which his client may have made to him on that head. *B. N. P.* 284. It has been said that the above case applies only where the attorney has his knowledge independently of any communication with his client.¹ *Wheatley v. Williams*, 1 M. & W. 533. It was there held that an attorney is not compellable to state whether a document shown to him by his client during a professional interview, was in the same state as when produced at the trial, namely, whether it was stamped or not. In *Dwyer v. Collins*, 7 Exch. 639; 21 L. J., Ex. 225, it was held, that the right of an attorney not to disclose matters with which he has become acquainted in the course of his employment, as such, does not extend to matters of fact which he knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them; and that upon this ground an attorney of a party to a suit is bound to answer on a trial, whether a particular document belonging to his client is in his possession, and is then in court. See also *Coates v. Birch*, 2 Q. B. 252, 42 E. C. L. In *R. v. Farley*, 1 Den. C. C. 197, when the wife of a prisoner took a forged will to an attorney at the prisoner's request, and asked if he could advance her husband some money upon the mortgage of property mentioned in the will; it was held, that this was not a privileged communication. So where a forged will was put into an attorney's hands not in professional confidence, but that by finding it among the title deeds of the deceased, which the prisoner sent with the will, he might be disposed to act upon it; it was held, by all the judges, that the communication, was not privileged. *R. v. Jones*, 1 Den. C. C. R. 166.

*And the matter must also be one which is a subject of professional confidence. Thus the clerk of an attorney may be called

¹ So if after the relation has ceased, the client voluntarily repeats to him what had been before communicated in his professional character. *Jordon v. Hess*, 13 Johns. 492. S.

to identify a party, though he has only become acquainted with him in his professional capacity; for it is a fact cognizable both by the witness and by others, without any confidence being reposed in him. *Studdy v. Saunders*, 2 Dow. & Ry. 347; though the contrary was, upon one occasion, ruled by Mr. Justice Holroyd. *Parkins v. Hawkshaw*, 2 Stark. N. P. C. 240, 3 E. C. L. So an attorney's clerk may be called to prove the receipt of a particular paper from the other party, for it is a mere fact. *Eicke v. Nokes*, Moo. & M. 303. So an attorney conducting a cause may be called and asked who employed him, in order to let in the declarations of that person as the real party. *Levy v. Pope*, Moo. & M. 410. So he may prove that his client is in possession of a particular document, in order to let in secondary evidence of its contents. *Beavan v. Waters*, M. & M. 235. So to prove his client's handwriting, though his knowledge was obtained from witnessing the execution of the bail-bond in the action; *Hurd v. Moring*, 1 C. & P. 372, 12 E. C. L.; *Robson v. Kemp*, 5 Esp. 52.¹ So where an attorney is present when his client is sworn to an answer in chancery, on an indictment for perjury, he will, it is said, be a good witness to prove the fact of the taking of the oath, for it is not a matter of secrecy committed to him by his client. *Bull. N. P. 214*. But in *R. v. Watkinson*, 3 Str. 1122, where the solicitor, on a similar indictment, was called to speak to the identity of the defendant's person, the chief justice would not compel him to be sworn. "*Quære tamen?*" says the reporter; "for it was a fact within his own knowledge." And Lord Brougham, in commenting upon this case, in *Greenough v. Gaskell*, 1 Myl. & K. 108, observes, that the putting in of the answer, so far from being a secret, was in its very nature a matter of publicity, and that the case cannot be considered as law at the present day.

There is no doubt that the privilege may be equally claimed, whether the client be the prisoner himself or any other person, or whether the subject of the confidence be the actual charge against the prisoner or any other professional communication. Thus in a prosecution for the forgery of a promissory note, the attorney who had the note in his possession refused to produce it. He stated that he had been consulted by the prisoner on the note in question, and that by his direction he had commenced an action against the person in whose name it was forged. The attorney was not employed for the prosecution, and a demand of the note had been made upon him by the prisoner's attorney. Mr. Justice Holroyd refused to make an order upon the attorney to produce the note, or to give a copy of it to the clerk of arraigns, and a true bill having been found, he likewise held that the attorney was not bound to produce it on the trial. *R. v. Smith*, Derby Sum. Ass. 1822; 1 Phill. Ev. 118, 10th ed.

¹ *Husten v. Davis*, 3 Yeates, 4; *Johnson v. Daverne*, 19 Johns. 134. So to prove the execution of a deed, and that it is in his possession, under a notice to produce it; but he is not compellable to produce it, nor to disclose its contents. *Brandt v. Klein*, 17 Johns. 335; *Jackson v. McVey*, 18 Id. 330. See *Baker v. Arnold*, 1 Caines, 258; *McTavish v. Dunning*, Anthon's N. P. C. 82; *Phelps v. Riley*, 3 Conn. 266; *Caniff v. Meyers*, 15 Johns. 246. S.

In the case of an indictment for forging a will, an attorney employed by a party to put out money on mortgage, was applied to by the prisoner to procure him money on mortgage, and the prisoner produced a forged will in proof of his title to certain freehold lands, upon the security of which the attorney's other client advanced the money, the mortgage deeds being prepared by the attorney; and the prisoner's counsel objected to the attorney being examined, and cited *R. v. Smith, supra*; Patteson, J., said he thought that case was not law, and that the attorney might be examined to show what was the *157] transaction between the parties, and what led to that transaction; but said he would reserve the point for the consideration of the judges, if he should afterwards think it necessary to do so. The attorney was accordingly examined, and produced the will, which the learned judge thought he was bound to do. The prisoner was found guilty, but no sentence was passed, he having pleaded guilty to another indictment charging the transaction as a false pretence. *R. v. Avery*, 8 C. & P. 596, 34 E. C. L. But in *R. v. Tuff*, 1 Den. C. C. R. 334, Patteson, J., said, "The observations which I am reported to have made about *R. v. Smith*, seem too strong. I should have reserved the case of *R. v. Avery*, had not the prisoner pleaded guilty to another indictment, and so rendered it needless to press that farther." The distinction appears to be that if the information comes to the attorney in the course of his business, but before any relation of attorney and client is constituted, as in *R. v. Jones, supra*, then the evidence must be given. But if that relation is once constituted, all that passes is privileged, to whatever subject it may relate.

If from independent evidence it appears that the client made the communication with a criminal design, the attorney would be bound to disclose it. See *R. v. Farley, supra*, p. 155; *R. v. Avery, supra*; *Annesley v. Lord Anglesea*, 17 How. St. Tr. 1229; and see *Russell v. Jackson*, 9 Hare, 392; see also *R. v. Cox & Railton*, L. R. W. N., July 5, 1884, p. 160.

When the witness is privileged on the ground of public policy—persons in a judicial capacity. In *R. v. Watson*, a witness was questioned by the prisoner's counsel, as to his having produced and read a certain writing before the grand jury. On this being objected to, Lord Ellenborough, C. J., said, he had considerable doubts upon the subject: he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer. The question was not repeated. 32 How. St. Tr. 107. But it has since been held, that a witness for the prosecution in a case of felony, may be asked on cross-examination, whether he had not stated certain facts before the grand jury, and that the witness is bound to answer the question.¹

¹ See *Low's Case*, 4 Greenl. 439. A grand juror cannot be admitted to prove that a witness who has been examined swore differently before the grand jury. *Inlay v. Rogers*, 2 Halst. 347. But in action for a malicious prosecution one of the grand jury

R. v. Gibson, Carr. & M. 672, 41 E. C. L. See also *R. v. Russell*, Carr. & M. 247, 41 E. C. L.

According to an old case, a clerk attending before a grand jury shall not be compelled to reveal what was given in evidence. *Trials per Pais*, 220; 12 Vin. Ab. 38; *Evidence (B. a. 5)*. Where a bill of indictment was preferred for perjury committed at the quarter sessions, and it was proposed to examine one of the grand jury, who had acted as chairman at such sessions, Patteson, J., said, "This is a new point, but I should advise the grand jury not to examine him. He is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court." *R. v. Gazard*, 8 C. & P. 595, 34 E. C. L. (See as to incompetency, p. 130.)

When the witness is privileged on the ground of public policy—disclosures by informers, etc. Another class of privileged communications are those disclosures which are made by informers, or persons employed for the purpose, to the government, the magistracy, or the police, with the object of detecting and punishing offenders. The *general rule on this subject is thus laid down by Eyre, C. J.: [*158 "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in the present case." *R. v. Hardy*, 24 How. St. Tr. 808. It is not of course every communication made by an informer, to any person to whom he thinks fit to make it, that is privileged from being inquired into, but those only which are made to persons standing in a certain situation, and for the purposes of legal investigation or state inquiry. Communications made to government respecting treasonable matters are privileged, and a communication to a member of government is to be considered as a communication to government itself; and that person cannot be asked whether he has conveyed the information to government. *R. v. Watson*, 2 Stark. N. P. C. 136, 3 E. C. L. So a person employed by an officer of the executive government, to collect information at a meeting supposed to be held for treasonable purposes, was not allowed to disclose the name of his employer, or the nature of the connection between them. *R. v. Hardy*, 24 How. St. Tr. 753; *R. v. Watson*, Gurney's Rep. 159; 32 How. St. Tr. 100.

The protection extends to all communications made to officers of who returned the bill ignoramus, is a competent witness to prove who the prosecutor was. *Huidekoper v. Cotton*, 3 W. 56. The attorney for the Commonwealth cannot be called upon to testify to what passes in the grand jury room. *Commonwealth v. Tilden*, 2 Stark. Ev. new ed. 232, n. 1; *McLetton v. Richardson*, 13 Me. 82. S.

justice, or to persons who form links in the chain by which the information is conveyed to officers of justice.¹ A witness who had given information, admitted on a trial for high treason that he had communicated what he knew to a friend, who had advised him to make a disclosure to another person. He was asked whether that friend was a magistrate, and on his answering in the negative, he was asked who was the friend? It was objected, that the person by whose advice the information was given to one standing in the situation of a magistrate, was in fact the informer, and that his name could not be disclosed. The judges differed. Eyre, C. J., Hotham, B., and Grose, J., thought the question objectionable; Macdonald, C. B., and Buller, J., were of the opinion it should be admitted. Eyre, C. J., said, "Those questions which tend to the discovery of the channels by which the disclosures were made to the officers of justice, are not permitted to be asked. Such matters cannot be disclosed, upon the general principle of the convenience of public justice. It is no more competent to ask who the person was who advised the witness to make a disclosure, than it is to ask to whom he made the disclosure in consequence of that advice; or than it is to ask any other question respecting the channel of information, or what was done under it." Hotham, B., said, that the disclosure was made under a persuasion, that through the friend it would be conveyed to a magistrate, and that there was no distinction between a disclosure to the magistrate himself, and to a friend to communicate it to him. Macdonald, C. B., said, that if he were satisfied that the friend was a link in the chain of communication, he should agree that the rule applied, but that not being connected either with the magistracy or the executive government, the case did not appear to him to fall within the rule; *and the opinion of Buller, J., was founded on the same reason. *159] *R. v. Hardy*, 24 How. St. Tr. 811. The above cases were cited and considered in the *Attorney-General v. Briant*, 15 M. & W. 169, where the court decided, that upon the trial of an information for a breach of the revenue laws, a witness for the crown cannot be asked in cross-examination, "Did you give the information?" But on an indictment for administering poison with intent to murder, the police having, in consequence of certain information, found a bottle containing the poison, a policeman declined to state from whom he had received that information; but Cockburn, C. J., ordered him to answer the question put to him, which in the particular instance was material. *R. v. Richardson*, 3 F. & F. 693.

¹ The officer who apprehended the prisoner is not bound to disclose the name of the person from whom he received the information which led to the prisoner's apprehension. *United States v. Moses*, 4 Wash. C. C. 126. But a police officer will be compelled to answer at the instance of the Commonwealth. *Mina's Case*, Pamph., p. 9. In the trial of an indictment for larceny, a witness from whom the property is charged to have been stolen, is not bound to disclose the names of persons in his employment, who gave the information which induced him to take measures for the detection of the person indicted. *State v. Saper*, 16 Me. 293. The Secretary of State is not bound to disclose any official confidential communications. But the fact whether a commission has been in his office or not, he is bound to disclose. *Marbury v. Madison*, 1 Cr. 142. See 1 *Burr's Trial*, 180; *Gray v. Pentland*, 2 S. & R. 23. S.

When the witness is privileged on the ground of public policy—official communications. It has always been held that official communications relating to matters which affect the interests of the community at large may be withheld; thus the communications between the governor and law officers of a colony, *Wyatt v. Gore*, Holt N. P. C. 299; between the governor of a colony and one of the secretaries of state, *Anderson v. Hamilton*, 2 Br. & Bingh. 156, 6 E. C. L.; between a governor of a colony and a military officer, *Cooke v. Maxwell*, 2 Stark. 183, 3 E. C. L., are privileged. So where, on a trial for high treason, Lord Grenville was called upon to produce a letter intercepted at the post-office, and which was supposed to have come to his hands, it was ruled that he could not be required to produce it, for that secrets of state were not to be taken out of the hands of his Majesty's confidential subjects. Case cited by Lord Ellenborough, *Anderson v. Hamilton*, 2 Br. & Bingh. 157 (n), 6 E. C. L. What passes in parliament is in the same manner privileged. Thus on a trial for a libel upon Mr. Plunkett, a member of the Irish parliament, the speaker of the Irish House of Commons being called and asked, whether he had heard Mr. Plunkett deliver his sentiments in parliament on matters of a public nature, Lord Ellenborough said that the speaker was warranted in refusing to disclose what had taken place in a debate in the House of Commons. He *might* disclose what passed there, and if he thought fit to do so, he should receive it as evidence. As to the fact of Mr. Plunkett having spoken in parliament, or taken any part in the debate, he was bound to answer. That was a *fact*, containing no improper disclosure of any matter. *Plunkett v. Cobbett*, 5 Esp. 136; 29 How. St. Tr. 71, 72. On the same ground, viz., that the interests of the state are concerned, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced on behalf of the prisoner, was accurate. *R. v. Watson*, 2 Stark. N. P. C. 148, 3 E. C. L.

In *Dickson v. Lord Wilton*, 1 F. & F. 419, a clerk from the war office was sent with a paper which had been asked for, with instructions to object to its production and nothing more. Lord Campbell ordered it to be produced, not considering the mere objection of a subordinate officer sufficient. In *Beatson v. Skene*, 29 L. J., Ex. 430, the Secretary of State for the Home Department had been subpoenaed to produce certain documents written to him by an officer in the army. He attended at the trial, but objected to produce the documents on the ground that his doing so would be injurious to the public service. Bramwell, B., thereupon refused to compel him to do so, and a new trial was moved for upon this amongst other grounds. It appeared on discussion that the documents, even if produced, would *not have been admissible; but Pollock, C. B., in delivering the considered judgment of the Court of Exchequer, said [*160 that the majority of the court entirely concurred in the ruling of Mr. Baron Bramwell. He said: "We are of opinion that if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual

interest of a suitor in a court of justice ; and the question then arises, how is this to be determined ? It is manifest it must be determined either by the presiding judge, or by the responsible servant of the crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the document would be injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper ; and if he is in attendance and states that, in his opinion, the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. . . . If, indeed, the head of the department does not attend personally, to say that the production will be injurious, but sends the document to be produced or not, as the judge may think proper, or, as was the case in *Dickson v. Lord Wilton*, where a subordinate was sent with the document, with instructions to object and *nothing more*, the case may be different.”

Where, for revenue or other purposes, an oath of office has been taken not to divulge matters which have come to the knowledge of a party in his official capacity, he will not be allowed, where the interests of justice are concerned, to withhold his testimony. Thus, where the clerk to the commissioners of the property tax being called to produce the books containing the appointment of a party as collector, objected on the ground that he had been sworn not to disclose anything he should learn in his capacity of clerk, Lord Ellenborough clearly thought that the oath contained an implied exception of the evidence to be given in a court of justice, in obedience to a writ of *subpoena*. He added, that the witness must produce the books, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him. *Lee, q. t. v. Birrell*, 3 Camp. 337.

Objection to answer—how taken. The mode of taking the objection depends on the person to whom the privilege belongs. If the objection be on the ground that the answer would expose the witness to penal consequences, then it belongs to the witness himself, and to him only, who may insist on or abandon it, as he thinks fit. *Thomas v. Newton, M. & M.* 48 (n.); *R. v. Adey*, 1 Moo. & R. 94 ; in both of which cases Lord Tenterden said that counsel ought not to be allowed to argue the question in favor of the witness.¹ And it seems still more improper for counsel interested in excluding the evidence to suggest the objection to the witness. Frequently, indeed, the court, especially with an ignorant witness, will explain to him his position and the protection to which he is entitled, and the practice has been approved of. It has, indeed, sometimes been asserted that a question

¹ *White v. State*, 52 Miss. 216 ; *State v. Wentworth*, 65 Me. 234.

tending to criminate a witness cannot be *put*, which is an obvious error, as, until put, it cannot be seen whether or no the witness will *insist on his privilege. Of course, the court will not allow [*161 a witness to be attacked with questions which he obviously cannot be compelled to answer merely for the purpose of insulting him, which explains how it is that sometimes the court has interfered without waiting for the witness to claim his privilege. (See *supra*, p. 152.)

If the privilege be claimed on the ground of professional confidence, then the privilege belongs to the party who reposes the confidence, who may insist upon or waive it at his pleasure. The rule seems to be that it will be assumed that the privilege is insisted on unless the contrary be shown, and that it is not, therefore, generally necessary that the client should be present and insist personally on his privilege. *Tayl. Ev.* 450, 6th ed.; *Doe d. Gilbert v. Ross*, 7 M. & W. 102; *Newton v. Chaplin*, 10 C. B. 356, 70 E. C. L.; *Phelps v. Prew*, 3 E. & B. 430, 77 E. C. L. If the professional adviser chose to take upon himself the risk of answering the question, the court could hardly prevent him, though it might express its indignation at a manifest breach of professional confidence.

It was once thought that if the witness began to answer he must proceed; but in *R. v. Garbett*, 1 Den. C. C. 258, nine judges against six held that this was not so; and that the witness was entitled to his privilege at whatever stage of the inquiry he chose to claim it.

Effect of refusing to answer. Where a witness is entitled to decline answering a question, and does decline, the rule is said by *Holroyd, J.*, to be, that his not answering ought not to have any effect with the jury. *R. v. Watson*, 2 Stark. 157, 3 E. C. L. So where a witness demurred to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address to the jury remarked upon the refusal; *Abbott, C. J.*, interposed and said, that no inference was to be drawn from such refusal. *Rose v. Blakemore*, Ry. & Moo. N. P. C. 384. A similar opinion was expressed by *Lord Eldon*. *Lloyd v. Passingham*, 16 Ves. 64; see the note Ry. & Moo. N. P. C. 385. And it was said by *Bayley, J.*, in *R. v. Watson*, 2 Stark. 135, 3 E. C. L., "If the witness refuse to answer, it is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going too far to say, that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may."

Use which may be made of answer where privilege not claimed, or not allowed. Answers given to questions to which the witness might have objected, but does not do so, are admissible against him as admissions. *Smith v. Beadnell*, 1 Camp. 33.¹ But not answers to questions to which he objects, but as to which he is wrongly deprived

¹ A witness may waive his privilege. *People v. Arnold*, 40 Mich. 710.

of the benefit of his objection. *R. v. Garbett*, *ubi supra*. See also *R. v. Coote*, L. R. 4 P. C. 599; 42 L. J., Pr. C. 45; *ante*, pp. 60, 150. But if the witness is wrongfully compelled to answer, and he does answer, that does not render his evidence illegal as respects other parties. It is the witness's own affair, and another party cannot complain of it. *R. v. Kinglake*, 11 Cox, C. C., Q. B. 499.

In *R. v. Scott*, 25 L. J., M. C. 128, Dears. & B. C. C. 47; *R. v. Hallam*, 12 Cox, C. C. 174; *R. v. Widdop*, L. R. 2 C. C. 3; 42 L. J., M. C. 9; and *R. v. Cherry*, 12 Cox, C. C. 32, the law under the old Bankruptcy Acts was discussed.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 17, sub-sect. 8), the debtor is bound to answer all questions which the court allow to *162] *be put to him, and his answers may be used thereafter in evidence against him. But a mere witness is entitled to refuse to answer questions tending to criminate himself. *Ex parte Scholfield*, 6 Ch. D. 230. See *ante*, p. 52.

Where there was a question as to whether the summons was irregularly issued, but the trader appeared upon the summons and submitted to examination without objection, it was held that his answers might be given in evidence against him. *R. v. Widdop*, L. R. 2 C. C. 3; 42 L. J., M. C. 9.

The 24 & 25 Vict. c. 96, s. 85, *post*, "Agents, Bankers, and Factors," provides that the enactments with respect to frauds contained in the ten preceding sections shall not prevent a witness from giving evidence, and that if he does give evidence he shall not be liable to be convicted of any of those frauds.

*DOCUMENTARY EVIDENCE.

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The 8 & 9 Vict. c. 113. By this statute (E. & I.) for facilitating the admission in evidence of certain official and other documents, it is enacted (s. 1), "that whenever, by any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding; the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, *as directed by the respective acts made or to be hereafter made, [*164 without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature; or of the official character, of the person

appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

By s. 2, "All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts of Westminster; provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

By s. 3, "All copies of private and local and personal acts of parliament, not public acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the crown, or by the printers to either house of parliament [or under the superintendence or authority of Her Majesty's Stationery Office, 45 Vict. c. 9, s. 2], or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices and others, without any proof being given that such copies were so printed."

Sect. 4, after enacting (see *post*, Forgery) that persons who forge such seals, stamps, or signatures as above mentioned, or who print any private acts or journals of parliament with false purport, are guilty of felony, further provides, "that whenever any such document as before mentioned shall have been received in evidence by virtue of this act, the court, judge, commissioner, or other person officiating judicially, who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorized at its, or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court, or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the person or persons who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster, on application being made for that purpose."

The 14 & 15 Vict. c. 99. By this statute (E. & I.) it is enacted by s. 7, that "all proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state, or British colony, to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial pro-

ceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document, filed or deposited in any such court, the *authenticated copy to be admissible in evidence must purport [*165 either to be sealed with the seal of the foreign or colonial court to which the original document belongs; or in the event of such court having no seal, to be signed by the judge; or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy, that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed, as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

By s. 8, "Certificates of the qualification of an apothecary, under the common seal, shall be received in evidence without any proof of the said seal, or of the authenticity of the said certificate, and shall be deemed sufficient proof of qualification."

By ss. 9, 10, & 11, provision is made for the admission of documents in force in Ireland, in England or Wales, and *vice versa*; and for documents in force in England, Wales, or Ireland, in the colonies.

And after reciting that it is expedient, as far as possible, to reduce the expense attending upon the proof of criminal proceedings, it is enacted:—

By s. 13, "That whenever, in any proceedings whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

By s. 14, "Whenever any book or other document is of such public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice or before any person, now or hereafter, having by law, or by consent of parties, authority to hear, receive, and examine evidence; provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person apply-

ing at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

By s. 15, "If any officer authorized or required by this act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing the same is not a true copy *166] or extract, as the case may be, he shall be guilty of a *misdemeanor, and be liable upon conviction to imprisonment for any term not exceeding eighteen months."

By s. 16, "Every court, judge, justice, office, commissioner, arbitrator or other person, now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

By s. 17, "Persons forging the seal, stamp, or signature of any document, or tendering in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, shall be guilty of felony, and the court may direct that the same shall be impounded." For this section see *post*, tit. Forgery. By the 33 & 34 Vict. c. 52, s. 27, warrants of arrest and copies of depositions under the extradition laws are to be received in evidence if authenticated in manner specified by that act. See *ante*, p. 80.

14 & 15 Vict. c. 100. Sect. 22 of this statute, which is set out *post*, tit. Perjury, provides for the proof of the previous trial upon a trial for perjury.

28 Vict. c. 18, s. 6. A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of 5s. and no more shall be demanded or taken), shall upon proof of the identity of the person be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same; see *infra*, 34 & 35 Vict. c. 112, s. 18, as to previous conviction in any legal proceedings against any person.¹

31 & 32 Vict. c. 37, s. 2. Sect. 2 of this Act provides that *prima facie* evidence of any proclamation, etc., may be given in all legal pro-

¹ An arrest does not necessarily imply any record. Where a witness was asked whether he was not arrested for vagrancy it cannot be objected to on the ground that the record is the best evidence. *People v. Manning*, 48 Cal. 335.

ceedings by the production of a copy of the *Gazette*, or a copy of the proclamation, etc., properly printed, or in case of proclamations, etc., by the Privy Council, etc., by a properly certified copy or extract, which may be in print or writing, and no evidence of the handwriting of the person certifying is required.

34 & 35 Vict. c. 112, s. 18. A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and *purporting to be signed by the clerk of the court or other [*167 officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer, and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence, in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom, and a conviction before the passing of this act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorized by this section shall be in addition to, not in exclusion of, any authorized mode of proving such conviction.¹

Proof of acts of parliament, etc. The courts will take notice of public acts of parliament, without their being specially proved; but previously to the 8 & 9 Vict. c. 113, private acts of parliament must have been proved by a copy examined with the parliament roll, B. N. P. 225, unless the mode of proof was provided for by the act. Where there was a clause in the act, declaring that it should be taken to be a public act, and should be taken notice of as such by all judges, etc., without being specially pleaded, it was not necessary to prove a copy

¹ A conviction when proved is conclusive. See *infra*, page *922; Wharton's Criminal Evid. § 602 a, 9th edit. and cases cited; *Commonwealth v. Feldman*, 131 Mass. 588.

examined with the roll, or a copy printed by the king's printer, but it stood upon the same footing as a public act. *Beaumont v. Mountain*, 10 Bing. 404, 25 E. C. L.; *Woodward v. Cotton*, 4 Tyr. 689; 1 C., M. & R. 44; see also *Forman v. Dawes*, Carr. & M. 127, 41 E. C. L. But with regard to the recital of facts, such a clause did not give the statute the effect of a public act. *Brett v. Beales*, Moo. & M. 416.

Every act of parliament made since the passing of the 13 Vict. c. 21, s. 7, is now deemed to be a public act, and is to be judicially noticed as such, unless the contrary be expressly declared.

By the 41 Geo. 3, c. 90, s. 9, the statutes of England and (since the union with Scotland) of Great Britain, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Ireland; and in like manner the copy of the statutes of the kingdom of Ireland, made in the parliament of the same, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the parliament of Ireland prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain.

Formerly the journals of the lords and commons must have been proved by examined copies. *R. v. Lord Melville*, 24 How. St. Tr. 683; *R. v. Lord G. Gordon*, 2 Dougl. 593; but now see 8 & 9 Vict. c. 113, *ante*, p. 163.

***Proof of records.** A record is not complete until delivered *168] into court in parchment. Thus the minutes made by the clerk of the peace at sessions, in his minute book, are neither a record nor in the nature of a record so as to be admissible in evidence as proof of the names of the justices in attendance. *R. v. Bellamy*, Ry. & Moo. 171. And where, to prove an indictment for felony found by the grand jury, the indictment itself (which was in another court) indorsed "a true bill," was produced by the clerk of the peace, together with the minute book of the proceedings of the sessions at which the indictment was found, the Court of King's Bench held, that in order to prove the indictment it was necessary to have the record regularly drawn up, and that it should be proved by an examined copy. *R. v. Smith*, 8 B. & C. 341, 15 E. C. L.; *Cooke v. Maxwell*, 2 Stark. 183, 3 E. C. L. So an allegation that the grand jury at sessions found a true bill, is not proved by the production of the bill itself with an indorsement upon it, but a record, regularly made up, must be produced. *Porter v. Cooper*, 6 C. & P. 354, 25 E. C. L.; 4 Tyr. 456; 1 C., M. & R. 388. So it has been ruled on an indictment for perjury, that in order to prove that an appeal came on to be heard at sessions, it must be shown that a record was regularly made upon parchment, *R. v. Ward*, 6 C. & P. 366, 25 E. C. L.; and see *Reg. v. The Inhabitants of Pembridge*, Carr. & M. 157, 41 E. C. L. But where the object of the evidence was merely to prove the fact of a former trial, it was held on an indictment for perjury committed at such trial that the production by the officer of the court, of the caption, the indictment with

the indorsement of the prisoner's plea, the verdict and the sentence of the court upon it, was sufficient, without the production of the record, or a certificate of the same, under 14 & 15 Vict. c. 99, s. 13. *R. v. Newman*, 2 Den. C. C. R. 390; 21 L. J., M. C. 75. In *R. v. Scott*, 2 Q. B. D. 415; 46 L. J., M. C. 259 (see *post*, tit. Perjury), it was held that the existence of an action was sufficiently proved by the production, by the officer of the court, of the copy writ filed under Ord. V., rule 12 of the Rules of the Supreme Court, 1883. So a judgment on paper signed by the master is not evidence, for it is not yet become permanent. *B. N. P.* 228; *Godefroy v. Jay*, 1 M. & P. 236; 3 C. & P. 192, 14 E. C. L. In one case the minutes of the Lord Mayor's Court of London were allowed to be read as evidence of the proceedings there, the court assigning as a reason for not insisting rigidly upon the record being made up, that it was an inferior jurisdiction. *Fisher v. Lane*, 2 W. Bl. 834; 8 B. & C. 342, 15 E. C. L.

The mode of examination usually adopted is, for the person who is afterwards to prove it, to examine the copy while another person reads the original, and this has been held sufficient. *Reid v. Margison*, 1 Camp. 469; *Gyles v. Hill*, Id. 471 (*n*). It must appear that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records are kept. *Adamthwaite v. Synge*, 1 Stark. 183, 2 E. C. L.; 4 Campb. 572.

Where a record is lost, an old copy has been allowed to be given in evidence, without proof of its being a true copy. *Anon.*, 1 Ventr. 257; *B. N. P.* 228.

With respect to the proof of records before courts of criminal justice, as where a prisoner pleads *autrefois acquit* to an indictment, he may remove the record by *certiorari* into chancery, and have it exemplified; but it seems to be the usual practice for the clerk of assize or clerk of the peace to make up the record without writ, or to *attend with it at the trial. 3 Russ. Cri. 413, 5th ed. (*t*); 2 [169 Phill. Ev. 203, 10th ed.

Proof by office copies, and copies by authorized officers, etc. An office copy is not evidence of the original, if the latter be in another court. Thus office copies of depositions in chancery are evidence in chancery, but not at common law, without examination with the roll. *B. N. P.* 229; 5 M. & S. 38. In a court of common law, an office copy has been held sufficient in the same court and in the same cause. *Denn v. Fulford*, 2 Burr. 1177. And so it seems that an issue out of chancery may be considered as a proceeding in that court, and an office copy would probably be held evidence there. See *Highfield v. Peake*, Moo. & Mal. 111. There appears to be no reason for distinguishing between the effect of office copies in different causes in the same court, the principle of the admissibility being, that the court will give credit to the acts of its own officers; and accordingly it was held in one case, that an office copy made in another cause in the same court was admissible. *Wightwick v. Banks*, Forrest, 154.

Probably since the passing of the Judicature Acts, 1873 and 1875, and the transfer of separate jurisdictions to the High Court of Justice, the above cases have become less important. See also *R. v. Scott*, *supra*.

Where there is a known officer, whose duty it is to deliver out copies which form part of the title of the parties receiving them, and whose duty is not performed till the copy is delivered, as in the case of the chirograph of a fine and the enrolment of a deed, such copies are evidence, without proof of examination with the originals. See *Appleton v. Lord Braybrooke*, 6 M. & S. 34.

The certificate of the enrolment of a deed pursuant to the statute is a record and cannot be averred against. *R. v. Hopper*, 3 Price, 495. A copy of a judgment purporting to be examined by the clerk of the treasury (who is not intrusted to make copies), is not admissible without proof of examination with the original. *B. N. P.* 229. A judge's order may be proved by the production of the order itself, or by an office copy of the rule by which it has been made a rule of court. *Hill v. Halford*, 4 Campb. 17. Office copies of rules of court being made out by officers of the court in the execution of their duty are sufficient evidence without being proved to have been examined. *Selby v. Harris*, 1 Ld. Raym. 745; *Duncan v. Scott*, 1 Campb. 99. And printed copies of the rules of a court for the direction of its officers, printed by the direction of the court, are evidence without examination with the original. *Dance v. Robson*, Moo. & M. 294. Copies of records, in the custody of the master of the rolls, under the 1 & 2 Vict. c. 94, purporting to be sealed and stamped with the seal of the record office, are by s. 13 made evidence without further proof. As to the rejection of copies of accounts returned by the Supreme Court at Madras to the Q. B., see *Reg. v. Douglas*, 1 C. & K. 670, 47 E. C. L. As to office copies being rejected for containing abbreviations, see *Reg. v. Christian*, Carr. & M. 388, 41 E. C. L.¹

Proof of inquisitions. Inquisitions *post mortem*² and other private

¹ The exemplification of the judgment of a court of another State, to be admissible under the Act of Congress, 26 May, 1790, must be attested by the clerk under the seal of the court, with the certificate of the presiding judge that the attestation of the clerk is in due form. *Wilburn v. Hall*, 16 Mo. 168; *Ducommun v. Hysinger*, 14 Ill. 249; *Thompson v. Manson*, 1 Cal. 428; *Stewart v. Gray*, 1 Hemp. 94; *Trigg v. Conway*, 1 Hemp. 538; *State v. Hinchman*, 3 Cas. 479; *Case v. McGee*, 8 Md. 9; *Schoonmaker v. Lloyd*, 9 Rich. Law, 173; *Tappan v. Norvell*, 3 Sneed, 570; *Ordway v. Conroe*, 4 Wis. 45; *Draggou v. Graham*, 9 Ind. 212; *Washabaugh v. Entrioken*, 10 Cas. 74; *Orman v. Neville*, 14 La. 392; *Norwood v. Cobb*, 20 Tex. 588; *Spencer v. Langden*, 21 Ill. 192. Whenever it is the practice of the clerks to extend the judgments of the courts from the minutes and papers on file, the record thus extended is deemed by the court the original record; and no question will be allowed to be incidentally made, in relation either to the existence or the form of such record, when a copy duly authenticated is produced in proof. *Willard v. Harvey*, 4 Fost. 344. Writing done with a pencil is not admissible in public records, nor in papers drawn to be used in legal proceedings which must become public records. *Meseroe v. Hicks*, 4 Fost. 295. 8.

² The Massachusetts statute only requires the magistrate to file his report, and the fact that he has also filed the minutes of the testimony taken at the inquest will not entitle the defendant to put in evidence that fact, and the suppression of them by the State. *Commonwealth v. Ryan*, 134 Mass. 223.

offices cannot be read in evidence without proof of the commission upon which they are founded, unless, as it seems, the inquisition be old (Vin. Ab. Ev. A. b. 42); but in cases of more general concern, as the minister's return to the commission in Henry the Eighth's time to inquire into the value of livings, the commission is a thing *of such public notoriety that it requires no proof. *Per* [170 Hardw., C., in Sir H. Smithson's case, B. N. P. 228. An ancient extent of crown lands, found in the proper office, and purporting to have been taken by a steward of the king's lands, and following the directions of the statute 4 Edw. 1, will be presumed to have been taken under a competent authority, though the commission cannot be found. *Rowe v. Brenton*, 8 B. & C. 747, 15 E. C. L.

Proof of verdicts. The mode of proving a verdict depends upon the purpose for which it is produced.¹ Where it is offered in evidence, merely to prove that such a cause came on for trial, the *postea* with the verdict indorsed is sufficient. *Pitton v. Walker*, 1 Str. 162. So it is sufficient to introduce an account of what a witness, who is since dead, swore at a trial. *Per* Pratt, C. J., Id. So upon an indictment for perjury, committed by a witness in a cause, the *postea*, with a minute by the officer, of the verdict having been given, is sufficient to prove that the cause came on for trial. *R. v. Browne*, Moo. & M. 315. But without such minute, the *nisi prius* record is no evidence of the case having come on for trial. *Per* Lord Tenterden, Id. In London and Westminster, it is not the practice for the officer to indorse the *postea* itself as in the country, but the minute is indorsed on the jury panel. Id.

But where it is necessary to prove not merely that a trial was had, but that a verdict was given, it must be shown that the verdict has been entered upon the record, and that judgment thereupon has also been entered on record, for otherwise it would not appear that the verdict had not been set aside or judgment arrested. *Fisher v. Kitchingman*, Willes, 367; *Pitton v. Walter*, 1 Str. 162; B. N. P. 243. In one case, indeed, Abbott, J., admitted the *postea* as evidence of the amount recovered by the verdict; *Foster v. Compton*, 2 Stark. 364, 3 E. C. L.; and Lord Kenyon also ruled that it was sufficient proof to support a plea of set-off to the extent of the verdict; *Garland v. Schoones*, 2 Esp. 648; but these decisions appear to be questionable. An allegation in an indictment for perjury that judgment was "entered up" in an action, is proved by the production of the book from the judgment office, in which the *incipitur* is entered. *R. v. Gordon*. Carr. & M. 410, 41 E. C. L. Where an indictment for perjury against A. alleged that B. was convicted on an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record, when produced, that B. had

¹ *Ridgely et al. v. Spencer*, 2 Binn. 70; *Richardson's Lessee v. Parsons*, 1 H. & J. 253; *Green v. Stone*, Id. 405; *Mahoney v. Ashton*, 4 H. & McH. 295; *Rugan v. Kennedy*, 1 Over. 94; *Donaldson v. Jude*, 4 Bibb, 60; *Hinch v. Carratt*, 1 Const. Rep. 471; *Fetter v. Mulliner*, 2 Johns. 181. S.

been convicted, but the judgment against him had been reversed upon error, after the finding of the present indictment; it was held that the record produced supported the indictment. *R. v. Meek*, 9 C. & P. 513, 38 E. C. L. Where a writ is only inducement to the action, the taking out the writ may be proved without any copy of it, because, possibly, it might not be returned, and then it is no record; but where the writ itself is the gist of the action, a copy of the writ on record must be proved in the same manner as any other record. *B. N. P.* 234.

Proof of affidavit made in causes. In what manner an affidavit filed in the course of a cause is to be proved, does not appear to be well settled. In an action for a malicious prosecution, an examined copy had been admitted. *Crook v. Dowling*, 3 Dougl. 75, 26 E. C. L., but see *Rees v. Bowen*, M'Cl. & Y. 383. A distinction had been taken *171] between cases where the copy is required to be proved in a civil suit, and where it forms the foundation of a criminal proceeding, as upon an indictment for perjury. In *R. v. James*, 1 Show. 327; Carth. 220, the defendant was convicted of perjury upon proof of a copy of an affidavit; it was urged that it was only a copy, and that there was no proof that it had been made by the defendant; but it appearing that it had been made use of by the defendant in the course of the cause, the court held it sufficient. This case was, however, doubted in *Crook v. Dowling*, 3 Dougl. 75, 26 E. C. L., where Lord Mansfield said that on indictments for perjury he thought the original should be produced. Buller, J., also observed that wherever identity is in question, the original must be produced. *Id.* 77. The same rule is laid down with regard to the proof of answers in chancery upon indictments for perjury. *Vide infra*. It may be doubted how far the distinction in question has any foundation in principle, the rules of evidence with regard to the proof of documents being the same in civil and in criminal cases, and the consequences of the evidence not being a correct test of the nature of the evidence. As to affidavits sworn in foreign parts see the statutes collected in Tayl. on Ev., 6th ed., pp. 17-21.

Proof of proceedings in equity. A bill or answer in chancery, when produced in evidence for the purpose of showing that such proceedings have taken place, or for the purpose of proving the admissions made by the defendant in his answer, may be proved either by production of the original bill or answer, or by an examined copy, with evidence of the identity of the parties. *Hennell v. Lyon*, 1 B. & A. 182; *Ewer v. Ambrose*, 4 B. & C. 25, 10 E. C. L. But a distinction is taken where the answer is offered in evidence in a criminal proceeding, as upon an indictment for perjury, in which case it has been said to be necessary that the answer itself should be produced, and positive proof given by a witness acquainted with him, that the defendant was sworn to it. *Chambers v. Robinson*, B. N. P. 239; *Lady Dartmouth v. Roberts*, 16 East, 334. In order to prove that

the answer was sworn by the defendant, it is sufficient to prove his signature to it, and that of the master in chancery before whom it purports to be sworn. *R. v. Benson*, 2 Camp. 507; *R. v. Morris*, B. N. P. 239; 2 Burr. 1189, S. C.

A decree in chancery may be proved by an exemplification, or by an examined copy, or by a decretal order in paper, with proof of the bill and answer, or without such proof, if the bill and answer be recited in the decretal order. B. N. P. 244. Com. Dig. Testm. (C. 1.) With regard to the proof of the previous proceedings, the correct rule appears to be, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact (as that a *decree* was made by the court), he ought regularly to give in evidence the proceedings on which the decree is founded. 2 Phill. Ev. 207, 10th ed. See *Blower v. Hollis*, 3 Tyr. 356; 1 C. & M. 393.

As to the admissibility of decrees in equity, see *Pim v. Currell*, 6 M. & W. 234.

Proof of depositions. The depositions of witnesses, who are since dead, may, when admissible, be proved by the judge's notes, or by notes taken by any other person who can swear to their accuracy, or *the former evidence may be proved by any person who will swear from his memory to its having been given. *Per Mansfield, C. J., Mayor of Doncaster v. Day*, 3 Taunt. 262. [*172]

Where depositions in chancery are offered in evidence, merely for the purpose of proving a fact admitted in them, or of contradicting a witness, it is not necessary to give evidence of the bill and answer. But where it is necessary to show that they were made in the course of a judicial proceeding, as upon an indictment for perjury in the deponent, proof of the bill and answer will be required. But the judge only is to look at them for the purpose of determining whether the depositions sought to be put in are evidence. *Chappell v. Purday*, 14 M. & W. 303. Where the suit is so ancient that no bill or answer can be found, the depositions may be read without proof of them. Depositions taken by command of Queen Elizabeth upon petition without bill and answer, were upon a solemn hearing in chancery allowed to be read. *Lord Hunsdon v. Lady Arundell*, Hob. 112; B. N. P. 240. So depositions taken in 1686 were allowed to be read without such proof; *Byam v. Booth*, 2 Price, 234; and answers to old interrogatories were searched for and not found. *Rowe v. Brenton*, 8 B. & C. 765, 15 E. C. L. But, in general, depositions taken upon interrogatories under a commission cannot be read without proof of the commission. *Bayley v. Wylie*, 6 Esp. 85.

Proof of proceedings in Bankruptcy. See *post*, "Bankruptcy."

Proof of judgments and proceedings of inferior courts. The judgments and proceedings of inferior courts, not of record, may be proved by the minute book in which the proceedings are entered, as in the case of a judgment in the county court. *Chandler v. Roberts*,

Peake, Ev. 72, 5th ed. So an examined copy of the minutes will be sufficient. *Per* Holt, C. J., Comb. 337; 12 Vin. Ab. Evid. A. pl. 26.¹ If the proceedings of the inferior court are not entered in the books, they may be proved by the officer of the court, or by some person conversant with the fact. See *Dyson v. Wood*, 3 B. & C. 451, 453, 10 E. C. L.

Proof of records and proceedings in county courts. It is enacted, by the 9 & 10 Vict. c. 95, s. 111, "that the clerk of every court holden under this act shall cause a note of all plaints and summonses, and of all orders and of all judgments and executions and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceedings without any further proof." Under this section it has been decided that such minutes of proceedings cannot be contradicted by the evidence of the judge. *Dews v. Ryley*, 20 L. J. C. P. 264. And the proceedings of the county court can be proved in no other way. *R. v. Rowland*, 1 F. & F. 72, *ante*, p. 3.²

Proof of probates and letters of administration. The probate of a will is proved by the production of the instrument itself; and proof *of the seal of the court is not necessary. In order to prove the *173] title of the executor to personal property, the probate must be given in evidence. *Pinney v. Pinney*, 8 B. & C. 335, 15 E. C. L. When the probate is lost it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthose*, 1 Str. 412. To prove the probate revoked an entry of the revocation in the book of the Prerogative Court is good evidence. *R. v. Ramsbotham*, 1 Leach, 30 (n) 3rd ed.

Administration is proved by the production of the letters of administration granted by the Ecclesiastical Court. *Kempton v. Cross*, Rep. temp. Hardw. 108; B. N. P. 246. So the original book of acts of that court directing the granting the letters is evidence. B. N. P. 246.

¹ Proceedings in civil suits before justices of the peace are within the rule, and sworn copies are evidence. *Welsh v. Crawford*, 14 S. & R. 440. The certificate of a clerk of an inferior court, in relation to any matter pertaining to his office, is not competent evidence unless certified under his hand and seal of office, if there be one; if not, then under his private seal. *Thomasson v. Drishell*, 13 Ga. 253. S.

Where one party to a suit offers in evidence detached portions of records of courts the other party may put in the remaining portions. *State v. Hawkins*, 81 Ind. 486.

² But when on cross-examination a witness testified that he has been in jail, it was held proper to ask him for what offence, it appearing that he had not been sent there by the sentence of any court. But if there is a court record it must be produced. *State v. Pike*, 65 Me. 111.

And an examined copy of such act book is also evidence. *Davis v. Williams*, 13 East, 232.

By the 20 & 21 Vict. c. 77, s. 69, an official copy of a will, or certificate of letters of administration, may be obtained, and it seems will be admitted in evidence where the probate is lost. 2 Taylor on Ev. 1362, 6th ed.

Proof of foreign laws. The law of a foreign state may be proved by the parol evidence of witnesses possessing competent legal skill, see *ante*, p. 148. The witness to prove a foreign law must be a person *veritus virtute officii* or *virtute professionis*. A Roman Catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such was authorized to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Sussex Peerage Case*, 11 Cl. & Fin. 85; 1 C. & K. 213, 47 E. C. L. Such a witness may refer to foreign law books to refresh his memory or to correct and confirm his opinion, but the law itself must be taken from his evidence, see *ante*, p. 148.

A judgment duly verified by a seal proved to be that of the foreign court, is presumed to be regular and agreeable to the foreign law, until the contrary is shown. *Alivon v. Furnival*, 14 Tyr. 757; 1 C. M. & R. 277, see 14 & 15 Vict. c. 99, s. 7, *ante*, p. 164.¹

Proof of public books and other documents. Wherever the contents of a public book or document are admissible in evidence as such, examined copies are likewise evidence, as in the case of registers of marriages, deaths, etc.;² as are likewise *certified* copies under the 14 & 15

¹ Reports or adjudged cases are not evidence of what is the law of the State or country in which they are pronounced. The written law of foreign countries should be proved by the law itself as written, and the common or customary unwritten law, by witnesses acquainted with the law. *Gardner v. Lewis*, 7 Gill. 377. By the common law, foreign judgments are authenticated,—first by an exemplification under the great seal of the State; second, by a copy proved to be a true copy by a person who has examined and compared it with the original; third, by a certificate of the officer authorized by law to give a copy. *Stewart v. Swanzy*, 1 Cushm. 502. The public seal of a State, affixed to the exemplification of a law, proves itself. *Robinson et al. v. Gilman*, 20 Me. 299. A copy of the laws published annually by the authority of the legislature, is evidence of the statutes contained in it, whether they be public or private. *Gray v. Monongahela Nav. Co.*, 2 W. & S. 156. [*Commonwealth v. Whitman*, 121 Mass. 361.] The written laws of the other States of the Union cannot be proved here by parol evidence. But the printed statute-books purporting to be published by authority are *prima facie* evidence here of the statutes they contain. *Comparit v. Jernigan et al.*, 5 Blackf. 375. S. *Re Roberts*, 5 Col. 525; *McDeed v. McDeed*, 67 Ill. 545. Compare, *supra*, p. *16, n., and cases cited.

On a *quo warranto*, the relator cannot give in evidence the copy of the record from the court of another State, to show that he had been naturalized, where the record is without the proper certificate of the presiding judge as required by Congress and is otherwise incomplete. *Brackets v. People*, 64 Ill. 170.

² Official books and papers must be proved by producing an exemplified copy from the proper office; or if circumstances require that the originals should be produced, they must be brought from the office and verified by the officer who has the keeping of them, or his clerk, or some one specially authorized by him for that purpose. They cannot be verified by one who has no connection with the office, but who happens to know them. *Hackenbury v. Carlisle*, 1 W. & S. 383. S.

Vict. c. 99, s. 14; *ante* p. 165. Thus an examined copy of an order in council is sufficient, without the production of the council books themselves. *Eyre v. Palsgrave*, 2 Campb. 605. See now 31 & 32 Vict. c. 37; *ante*, p. 166. So copies of the transfer books of the East India Company; *Anon.*, 2 Dougl. 593 (n); and of the Bank of England; *Marsh v. Collnett*, 1 Esp. 665; *Bretton v. Cope*, Peake, N. P. C. 43; of a bank note filed at the bank; *Mann v. Cary*, 3 Salk. 155; so the books of commissioners of land-tax; *King's case*, 2 T. R. 234; or of Excise; *Fuller v. Fotch*, Carth. 346; or of a poll-book at elections; *Mead v. Robinson*, Willes, 424. In one case the copy of an agreement contained in one of the books of the Bodleian Library (which cannot be removed) was allowed to be read in evidence. *Downes v. Mooreman*, Bunb. 189; 2 Gwill. 659. The books of the King's Bench and Fleet Prisons, when they are admissible, are not *174] *such public documents that a copy of them may be given in evidence, for they are not kept by any public authority. *Salte v. Thomas*, 3 B. & P. 190. Copies of entries or extracts from the register of newspaper proprietors, purporting to be certified by the registrar, or his deputy, or under the official seal of the registrar, are to be received as conclusive evidence; and certified copies or extracts are to be received as *prima facie* evidence in all proceedings under the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 15, see *post*, title, Libel.

Corporation books may be given in evidence as public books, when they have been kept as such, the entries having been made by the proper officer, or by a third person, in his sickness or absence. *Mothersell's case*, 1 Str. 93. But a book containing minutes of corporation proceedings, kept by a person not a member of the corporation, and not kept as a public book, is inadmissible. *Id.* An examined copy of a corporate book is evidence.¹ *Brocas v. Mayor of London*, 1 Str. 307; *Gwyn's case*, 1 Str. 401. It is not settled whether the attesting witness of a corporation deed need be called. *Doe v. Chambers*, 4 A. & E. 410, 31 E. C. L.; or whether such a deed proves itself after thirty years. *Rex v. Bathwick*, 2 B. & Ad. 639, 22 E. C. L. Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases, where it would have the effect of making a defendant furnish evidence to criminate himself. *R. v. Heydon*, 1 W. Bl. 351; *R. v. Purnell*, *Id.* 37; 1 Willes, 239; 2 Str. 1210. By 45 & 46 Vict. c. 50, s. 24, provision is made for the proof of by-laws of any town council by the production of a written copy of such by-laws authenticated by the corporate seal, and by sect. 22, for the proof of minutes purporting to be signed by the mayor, or a member of the council, or of the committee, appearing to be chairman of the meeting at which the minute is signed. Certificates of incorporation, and certified copies of documents, filed

¹ *Owing v. Speed*, 5 Wheat. 420. They are evidence in disputes between its members, but not against strangers. *Commonwealth v. Woelper et al.*, 3 S. & R. 29; *Jackson v. Walsh*, 3 Johns. 226. Must be kept by the proper officer. *Highlands Turnpike Co. v. McKean*, 10 Johns. 154. S.

and registered under the Companies Acts, 1862 to 1877, may now be received in evidence under the 40 & 41 Vict. c. 26, s. 6.

By the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 24, every instrument or document, copy or extract of instrument or document bearing the seal or stamp of the central office, shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor in this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.

Proof of banker's books. By the Banker's Books Evidence Act, 1879 (42 & 43 Vict. c. 11), entries in the books of any bank, and copies of such entries are made admissible, where the conditions imposed by the Act have been complied with; and the provisions of that Act are extended to any company carrying on the business of bankers, to which the provisions of the Companies Act, 1862 to 1880, are applicable.

Proof of registers of births, deaths, and marriages. Public registers, as of births, marriages, or deaths, are proved either by the production of the register itself or of an examined copy. B. N. P. 247. Parol evidence of the contents of a register has been admitted; yet the propriety of such evidence, says Buller, may well be doubted, because *it is not the best evidence the nature of the case is capable of. [*175 Id. A copy of a record or a public book is not, in fact, secondary evidence; and therefore the opinion of Mr. Justice Buller appears to be correct. A register is only one mode of proof of the fact which it records, and the fact may be proved without producing the register, by the evidence of persons who were present. Thus upon an indictment for bigamy, it was held sufficient to prove the marriage, by the evidence of a person who was present at it, without proving the registration, license, or banns.¹ R. v. Allison, Russ. & Ry. 109.

In proving a register, some evidence of the identity of the parties must be given, as by proof of handwriting, for which purpose it is not necessary to call the subscribing witnesses. *Per* Lord Mansfield, *Birt v. Barlow*, 1 Dougl. 170, *a*. The identity is usually established by calling the minister, clerk, or some other person who was present at the ceremony.

In *R. v. Nash*, 2 Den. C. C. R. 493; 21 L. J., M. C. 147, upon an indictment for forging and uttering a transfer of shares in a railway company, it was held that the register of shareholders kept under the 8 & 9 Vict. c. 16, s. 9, was evidence to prove that an individual was a shareholder without any authentication of the seal, and that in order

¹ *Lessee of Hyam v. Edwards*, 1 Dall. 2; *Stover v. Lessee of Whitman*, 6 Binn. 416; *Jacocks v. Gilliam*, 2 Murph. 47; *Huntley v. Comstock*, 2 Root, 99; *Jackson v. Boneham*, 15 Johns. 225; *Sumner v. Sebee*, 3 Greenl. 223. S. Com. v. Norcross, 9 Mass. 492.

So to rebut the presumption of marriage arising from a record, the evidence of one of the parties denying that the marriage ever took place is admissible. *Com. v. Waterman*, 122 Mass. 43.

to sustain the indictment it was unnecessary to give further proof that such individual was a shareholder of the company.

By the 52 Geo. 3, c. 146, ss. 6, 7 (which is still in force for the registration of births and burials by clergymen of the church of England), it is provided that verified copies shall be annually sent to the registrar of the diocese. It seems that such verified copies, being public documents, are evidence as well as the originals, and may be proved by examined copies. But it is otherwise of the returns enjoined by the canons of 1603, which can only be used as secondary evidence. *Per* Alderson, B., *Walker v. Beauchamp*, 6 C. & P. 552, 25 E. C. L. By the 6 & 7 Will. 4, c. 86, s. 38, for registering births, marriages, and deaths in England, certified copies of entries purporting to be sealed or stamped with the seal of the office of the registrar-general, shall be evidence of the birth, death, or marriage to which they relate, without further proof of such entries. By the 3 & 4 Vict. c. 92, certain non-parochial registers of births, marriages, and deaths, transferred to the general register office, or certified extracts therefrom, are made admissible in evidence; but in criminal cases the original registers must (by s. 17) be produced. But under 14 & 15 Vict. c. 99, s. 14, *ante*, p. 165, relating to examined and certified copies, an extract from a register of births purporting to be signed and certified by a deputy superintendent registrar, as the person in whose custody the register book is, is admissible in evidence on its mere production. *R. v. Weaver*, L. R. 2 C. C. 85; 43 L. J., M. C. 13. By 37 & 38 Vict. c. 88, s. 38, the act consolidating the law relating to registration of births and deaths, an entry or certified copy of a birth or death in a register under the Births and Deaths Registration Acts 1836 to 1874, or in a certified copy of such register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate by a coroner, or in pursuance of the provisions of this act with respect to the registration of births and deaths at sea.

*176] *As to marriage registers in Ireland, see the 7 & 8 Vict. c. 81. For the act amending the law of marriages, see *post*, Bigamy.

Proof of ancient documents, terriers, etc. In many cases ancient documents are admitted in evidence, to establish facts which, had they been recently made, they would not have been allowed to prove. These documents prove themselves, provided that it appear that they are produced out of the proper custody. The proper repository of ecclesiastical terriers or maps is the registry of the bishop or archdeacon of the diocese. *Atkins v. Hatton*, 2 Anst. 386; *Potts v. Durant*, 3 Anst. 795. On an issue to try the boundaries of two parishes, an old terrier or map of their limits, drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, not being signed by any

person bearing a public character or office in the parish. *Earl v. Lewis*, 4 Esp. 1.

So also with regard to private ancient documents, it must appear that they came from the custody of some person connected with the property. Thus, where upon an issue to try a right of common, an old grant to a priory, brought from the Cottonian MSS. in the British Museum, was offered in evidence, it was rejected by Lawrence, J., the possession of it not being sufficiently accounted for, nor connected with any one who had an interest in the land. *Swinnerton v. Marquis of Stafford*, 3 Taunt. 91. So a grant to the abbey of Glastonbury, contained in an ancient MS., deposited in the Bodleian Library, entitled *Secretum Abbatis*, was rejected, as not coming from the proper repository. *Mitchell v. Rabbets*, cited *Id.* See also *R. v. Barber*, 1 C. & K. 434, 47 E. C. L.

Proof of seals. Where necessary, a seal must be proved by some one acquainted with it, but it is not requisite to call a witness who saw it affixed. *Moises v. Thornton*, 8 T. R. 307. Some seals, as that of London, require no proof. *Doe v. Mason*, 1 Esp. 53. So the seal of the superior ecclesiastical courts, and other superior courts, 8 & 9 Vict. c. 113, s. 1, *ante*, p. 163. But the seal of a foreign court must be shown to be genuine. *Henry v. Adey*, 3 East, 221 (but see 14 & 15 Vict. c. 99, s. 7, *ante*, p. 164). So of the Bank of England.¹ *Semb. Doe v. Chambers*, 4 A. & E. 410, 31 E. C. L. So of the Apothecaries' Company. *Chadwick v. Bunning, R. & Moo.* 306.

For the provisions of the 8 & 9 Vict. c. 113, dispensing with proof of the seals of corporations, joint stock or other companies, further extended by 14 & 15 Vict. c. 99, see *ante*, p. 165.

As to seals attached to documents in the course of proceedings out of England see the statutes referred to, *Tayl. on Ev.* 6th ed., pp. 17-21.

Although the seal need not be shown to be affixed by the proper person, yet the deed may be invalidated by proof of the seal being affixed by a stranger, or without proper authority. *Clarke v. Imperial Gas Co.*, 4 B. & Ad. 315, 24 E. C. L.

Proof of private documents—attesting witness. The execution of a private document, which has been attested by a witness subscribing it, must be proved by calling that witness; and this was formerly the case although the document was not such as by law was required to have the attestation of a witness.² Thus it was held that if a

¹ The seal of a private corporation must be proved. *Den v. Vreelandt*, 2 Halst. 352; *Leazure v. Hillegas*, 7 S. & R. 313; *Foster v. Shaw*, *Id.* 156; *Jackson v. Pratt*, 10 Johns. 381. S.

² Upon the subject of proof by attesting witnesses, see 1 Stark. on Ev., new ed. 320, and notes.

In order to prove the execution of a paper by secondary evidence, it is only necessary for the party to show that he has neglected nothing which afforded a reasonable hope of procuring the testimony of the subscribing witness. *Conrad v. Farrow*, 5 W. 536. The absence of a witness from the State, so far as it affects the admissibility of secondary testimony, has the same effect as his death. *Allen v. Borghaus*, 8 W. 77;

*[177] *warrant of distress has been attested, the attesting witness must be produced. *Higgs v. Dixon*, 2 Stark. 180, 3 E. C. L.

Proof of private documents—attesting witness—when proof waived. Where the attesting witness is dead; *Anon.*, 12 Mod. 607; or blind; *Wood v. Drury*, 1 Lord Raym. 734; *Pedley v. Paige*, 1 Moo. & Rob. 258; or insane; *Currie v. Child*, 3 Campb. 283; or infamous (but now see the 6 & 7 Vict. c. 85, s. 1); *Jones v. Mason*, 2 Str. 833; or under sentence of death, see *ante*, p. 124; or absent in a foreign country, or not amenable to the process of the superior courts; *Prince v. Blackburn*, 2 East. 252; as in Ireland; *Hodnett v. Foreman*, 1 Stark. 90; or where he cannot be found, after diligent inquiry;

Teall v. Van Wyck, 10 Barb. 376. When there is other proof that the witness is dead or absent, it is unnecessary to take out a subpoena. *Clark v. Boyd*, 2 O. 59. In the absence of the instrumental witness, or of proof of the handwriting of the witnesses and parties, the next best evidence is the acknowledgment of the parties. *Ringwood v. Bethlehem*, 1 Green, 221. The confession of a party that he executed a paper has been held not to be secondary to proof of handwriting. *Conrad v. Farrow*, 5 W. 536. In order to prove an attested deed, the subscribing witness must be called, if within the reach of process and in a situation to be sworn; and neither the testimony of the party to the instrument, nor his admissions out of court, can be received as a substitute. *Hollenback v. Fleming*, 6 Hill, 303. If a subscribing witness to a bond be interested at the time of attestation, and dead at the time of the trial, evidence of his handwriting is not admissible to prove the execution of the bond. *Amherst Bank v. Root*, 2 Metc. 522. Where it appeared that the subscribing witness to a bond had been clerk of the county court of a large, populous, and wealthy county, and had been dead only twenty-five years, it was held not to be sufficient for admitting testimony of the obligor's handwriting, to show, by one witness only, that he did not know the subscribing witness's handwriting, and did not know of any person who had such knowledge. *McKinder v. Littlejohn*, 1 Ired. Law, 66. Where the subscribing witnesses to an instrument reside without the limits of the State, it is not necessary to produce their testimony. *Emery v. Twombly*, 17 Me. 65. If the attesting witness to a promissory note be called, and does not prove the handwriting of the name to be his, it is competent to prove it by the testimony of other witnesses. *Quimby v. Buzzle*, 16 Me. 470. Where an instrument is read in evidence on proof merely of the handwriting of a deceased attesting witness, the adverse party may give evidence of a witness's bad character at the time of attesting, or show his subsequent declarations that the instrument was a forgery. So, the entries of a clerk, when resorted to as a substitute for his oath, may be impeached by proof of his bad character for honesty. *Losee v. Losee*, 2 Hill, 609. The case of *Jackson v. Phillips*, 9 Cow. 94, so far as it holds that one who affixes his name to an instrument after its execution, without being requested, is a good subscribing witness, disapproved. *Hollenback v. Fleming*, 6 Hill, 303. Proof of the handwriting of deceased subscribing witness to a deed is not sufficient evidence of its execution to entitle it to be read to the jury, where the deed on its face excites suspicion of fraud. *Brown v. Kimball*, 25 Wend. 259. It is not necessary to call more than one of the witnesses to an instrument of writing, in order to prove its execution. *McAdams v. Stilwell*, 13 Pa. St. 90. If a subscribing witness to an instrument merely makes his mark, instead of writing his name, the instrument is to be proved by adducing proof of the handwriting of the party executing it. *Watts v. Kilburn*, 7 Ga. 356. The fact that a subscribing witness had gone to sea, and had not been heard from for four years, is sufficient to let in secondary evidence of his handwriting; but a temporary absence from the State is not enough. *Gaither v. Martin*, 3 Md. 146. When the subscribing witnesses to a writing reside out of the State, it is not necessary to produce them. *Frazier v. Moore*, 11 Tex. 755. A subscribing witness to a written instrument must be produced, if he can be had, such being the best evidence of its execution. *Foye v. Leighton*, 4 Fost. 29. Subscribing witnesses must be called or their absence accounted for. *Story v. Lovett*, 1 E. D. S. 153; *Tinnen v. Price*, 31 Miss. 422; *McGowan v. Laughlan*, 12 La. An. 242; *Powell's Heirs v. Hendricks*, 3 Cal. 427.

Cunliffe v. Sefton, 2 East, 183 ; in all these cases evidence of the attesting witness's handwriting is admissible. Some evidence must be given in these cases of the identity of the executing party ; and although there are cases to the contrary, it is now held that mere identity of name is not sufficient proof of the identity of the party. *Whitelock v. Musgrave*, 1 Crom. & Mee. 511 ; 3 Tyr. 541. The illness of a witness, although he lies without hope of recovery, is no sufficient ground for letting in evidence of his handwriting. *Harrison v. Blades*, 3 Campb. 457. Where the name of a fictitious witness is inserted ; *Fasset v. Brown, Peake*, Ev. 96 ; or where the attesting witness denies all knowledge of the execution ; *Talbot v. Hodgson*, 7 Taunt. 251, 2 E. C. L. ; *Fitzgerald v. Elsee*, 2 Campb. 635 ; evidence of the handwriting of the party is sufficient proof of its execution. So where an attesting witness subscribes his name without the knowledge or consent of the parties. *M'Craw v. Gentry*, 3 Campb. 232. Where there are two attesting witnesses, and one of them cannot be produced, being dead, etc., it is not sufficient to prove his handwriting, but the other witness must be called. *Cunliffe v. Sefton*, 2 East, 183 ; *M'Craw v. Gentry*, 3 Campb. 232. But if neither can be produced, proof of the handwriting of one only is sufficient. *Adam v. Kerr*, 1 B. & P. 360. It is not necessary now to call the attesting witness in the case of any instrument to the validity of which attestation is not necessary. 28 Vict. c. 18, s. 7.

Proof of private documents—evidence of handwriting. Where a party cannot sign his name, but makes his mark, that mark may be proved by a person who has seen him make the mark, and is acquainted with it. *Per Tindel, C. J., hazit.* *George v. Surrey*, Moo. & M. 516. Where a witness had seen the party execute a bail-bond, but had never seen him write his name on any other occasion, and stated that the signature to the bond produced was like the handwriting which he saw subscribed, but that he had no belief on the subject, this was held to be evidence of the handwriting to go to the jury. *Garrels v. Alexander*, 4 Esp. 37. But it is otherwise where the witness has only seen the party write his name once, and then for the purpose of making the witness competent to give evidence in the suit. *Stranger v. Searle*, 1 Esp. 14.¹ Where the witness stated that he had only seen the party upon one occasion sign his name to an instrument to which he was attesting witness, and that he was unable to form an opinion as to the handwriting, without inspecting that other instrument, his evidence was held inadmissible. *Filliter v. Minchin*, Mann. Index, 131. In another case, under similar circumstances, *Dallas, J.*, allowed a witness to refresh his memory, by referring to *the original document, which he had formerly seen signed. [*178 *Burr v. Harper*, Holt, N. P. C. 420. It is sufficient if the witness has seen the party write his surname only. *Lewis v. Sapio*, Moo. & Mal. 39 ; overruling *Powell v. Ford*, 2 Stark. 164, 3 E. C. L.

¹ But see *contra*, *Reid v. State*, 20 Ga. 681.

It is not essential to the proof of handwriting, that the witness should have seen the party write. There are various other modes in which he may become acquainted with the handwriting.¹ Thus where a witness for the defendant stated that he had never seen the person in question write, but that his name was subscribed to an affidavit, which had been used by the plaintiff, and that he had examined that signature, so as to form an opinion which enabled him to say he believed the handwriting in question was genuine, this was held by Park, J., to be sufficient. *Smith v. Sainsbury*, 5 C. & P. 196, 24 E. C. L. So where letters are sent, directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be. *Per Lord Kenyon, Cary v. Pitt, Peake, Ev. 99.* And in general, if a witness has received letters from the party in question, and has acted upon them, it is a sufficient ground for stating his belief as to the handwriting. *Tharp v. Gilsburne*, 2 C. & P. 21, 12 E. C. L. And the receipt of letters, although the witness has never done any act upon them, has been held sufficient. *Doe v. Wallinger*, Mann. Index, 131. Formerly, a document could not, in criminal cases, be proved by comparing the handwriting with other handwriting of the same party, admitted to be genuine.² See *Burr v.*

¹ *Hammond's Case*, 2 Greenl. 33; *Russell v. Coffin*, 8 Pick. 143. As when the witness has received promissory notes which the party has paid. *Johnson v. Deverne*, 19 Johns. 134. See *Sharp v. Sharp et al.*, 2 Leigh, 249. So the officer of a bank in the habit of paying the party's checks. *Coffey's Case*, 4 Rog. Rec. 52. A witness may testify from having seen the party write, from having carried on a correspondence with him, or from an acquaintance gained from having seen handwriting acknowledged or proved to be his. *Page v. Hemans*, 14 Me. 478. [*State v. Gay*, 94 N. C. 814.] It must be shown that a witness who is called to prove the handwriting of a person, has had such means of knowledge as to furnish a reasonable presumption that he is qualified to form an opinion on the subject. *Allen v. State*, 3 Humph. 367. [*Haynie v. State*, 2 Tex. App. 168; *Heacock v. State*, 13 Tex. App. 97.] It is not necessary to give positive proof of handwriting, in order to submit the instrument to the jury. A qualified expression of belief that it is in his handwriting is sufficient. *Watson v. Brewster*, 1 Barr, 381. As to a knowledge of handwriting derived from correspondence: *McKonkey v. Gaylord*, 1 Jones's Law, 94; *Chaffee v. Taylor*, 3 Allen, 598. Witnesses who had frequently received and paid out bank notes, and one of whom had once carried a large number of them to the bank, which were all paid, but who had never seen either the president or cashier write, were allowed to prove a forgery. *Commonwealth v. Carey*, 2 Pick. 47. A witness who had seen a party write but once, is competent to testify as to his handwriting. *Bowman v. Sanborn*, 5 Fost. 87. The prosecutor in a criminal case, while it was pending, procured the defendant to write in his presence, to become acquainted with his handwriting: *held*, that his testimony as to the defendant's writing, thus obtained, was admissible at the trial. *Reid v. State*, 20 Ga. 681. It is not competent, upon cross-examination of a witness called to impugn the genuineness of a signature, to show him other papers signed by the same name, but irrelevant to the case, in order to test the accuracy of the witness. *Armstrong v. Thurston*, 11 Md. 148. *S. United States v. Chamberlain*, 12 Blatchford, 390.

² In criminal cases: *United States v. Craig*, 4 Wash. C. C. 729; *Hutchins's Case*, 4 Rog. Rec. 119; *Commonwealth v. Smith*, 6 S. & R. 571; *Penna. v. McKee*, Addison, 33, 35. In civil cases: *Jackson v. Phillips*, 9 Cow. 94; *Root's Adm. v. Rile's Adm.*, 1 Leigh, 216; *Martin v. Taylor*, 1 Wash. C. C. 1; *Pope v. Askew*, 1 Ired. Law. 16. It is admissible, however, where it goes in corroboration of other evidence. *McCorkle v. Binns*, 5 Binn. 349; *Farmer's Bank v. Whitehill*, 10 S. & R. 110; *Bank of Penna. v. Jacob's Adm.*, 1 P. & W. 161; *Boyd's Adm. v. Wilson*, Id. 211; *Myers v. Toscan*, 3 N.

Harper, Holt, N. P. 421. But in the case of ancient documents, where it is impossible that the usual proof of handwriting can be given, the rule as to comparison of hands did not apply. B. N. P. 236. Thus authentic ancient writings might be put into the hands of a witness, and he might be asked whether, upon a comparison of those with the document in question, he believed the latter to be genuine. Doe v. Tarver, Ry. & Moo. N. P. C. 141 ; 7 East, 282.

The rule as to comparison of handwriting did not apply to the court or the jury, who might compare the two documents together,

H. 47 ; Commonwealth v. Smith, 8 S. & R. 571 ; Penna. v. McKee, Addis. 33, 35 ; Callan v. Gaylord, 3 W. 321 ; Moody v. Rowell, 17 Pick. 490 ; Richardson v. Newcomb, 21 Pick. 315. It will not invalidate the positive testimony of an impeached witness. Bell v. Norwood, 7 La. 95. So comparison of seals is not sufficient. Chew v. Keck et al., 4 R. 163. Mere unaided comparison of hands is not in general admissible. But after evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with a writing concerning which there is no doubt. Baker v. Haines, 6 Whart. 284. A witness having no previous knowledge of the handwriting of a party, cannot be permitted to testify as to its authenticity from a mere comparison of hands in court. Wilson v. Kirkland, 5 Hill, 182. A witness is required to possess a knowledge of the person's handwriting, either from having seen him write, or from being familiar with his handwriting, before he can be allowed to testify to the genuineness of the signature, and he will not be allowed to testify from a comparison of handwriting. He must swear to the correspondence of the signatures with an example existing in his own mind. Kinney v. Flynn, 2 R. I. 319 ; Hopkins v. Maguire, 35 Me. 78. A witness to handwriting may refresh his memory by inspecting genuine writing. But he is incompetent if such inspection enables him to speak only from comparing the two signatures. McNair v. Commonwealth, 2 Cas. 388. A comparison of a proposed writing with other writings proved to be of the same person cannot be allowed as to the means of getting the proposed writing before the jury. Guffey v. Deeds, 5 Cas. 378. When different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and genuineness or simulation be inferred from comparison ; but other instruments or signatures are inadmissible for comparison only. Van Wyck v. McIntosh, 4 Kern. 439. Bishop v. State, 30 Ala. 34. [But they may be submitted to an expert, who may testify as to his opinion. Huston v. Schindler, 46 Ind. 38 ; United States v. Chamberlain, 12 Blatchford, 390 ; Rogers v. State, 11 Tex. App. 608.] When handwriting is to be proved by comparison, the test paper or standard must be proved by clear and undoubted evidence. Press copies or duplicates made by a copying machine cannot be made use of for that purpose. Commonwealth v. Eastman, 1 Cush. 189. [Van Sickle v. People, 9 Mich. 61.] Proof by comparison of hands generally is inadmissible. People v. Spooner, 1 Denio, 343 ; Chandler v. Le Barron, 45 Me. 534 ; Hoyt v. Stewart, 3 Bos. 447 ; Williams v. Drexel, 14 Md. 566 ; Jumpertz v. People, 21 Ill. 375 ; Power v. Frick, 2 Gr. Cases, 306 ; Clark v. Wyatt, 15 Ind. 271 ; Travis v. Brown, 43 Fa. St. 9 ; State v. Ward, 29 Vt. 225. [Jones v. State, 60 Ind. 241. See on this subject, Wharton's Crim. Ev., 9th ed., § 555, *et seq.*] An expert may compare papers already in the case for other purposes, whose genuineness is not disputed, with the handwriting in dispute, and give his opinion relative to the same ; and this before any evidence of belief, founded upon the handwriting, is introduced. And in like cases the jury may also make the comparison. Bowman v. Sanborn, 5 Fost. 87 ; Outlaw v. Hurdle, 1 Jones's Law, 150 ; Henderson v. Hackney, 16 Ga. 521 ; Hawkins v. Grimes, 13 B. Mon. 258 ; People v. Hewitt, 2 Park. C. R. 20. [But not where the paper with which the handwriting is to be compared is disputed. State v. Owen, 73 Mo. 440. Or where it is a paper not connected with the case. State v. Clinton, 67 Mo. 380. But if the expert declines to answer for lack of time to examine them, and the defendant does not ask for a continuance thereof, no exception lies to their exclusion. Commonwealth v. Pettes, 114 Mass. 307.] A witness skilled from long experience in detecting counterfeit bank bills, is a competent witness to prove certain notes to be counterfeit, though he does not know the signatures of the officers, his judgment being based on the character of the engraving. Jones v. Finch, 37 Miss. 461. 8.

when they were properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting.¹ *Griffiths v. Williams*, 1 Cr. & J. 47; *Solita v. Yarrow*, 1 Moo. & R. 133.

Formerly the rule was that no document could be used for the purpose of comparison unless it was already in evidence in the cause. *R. v. Morgan*, 1 Moo. & Robb. 134 (n). See, also, *Bromage v. Rice*, 7 C. & P. 548, 32 E. C. L.; *Doe v. Newton*, 5 A. & E. 514, 534, 31 E. C. L.; *Griffiths v. Ivery*, 11 A. & E. 322, 39 E. C. L.; *Hughes v. Rodgers*, 8 M. & W. 123; *Younge v. Honner*, 1 C. & K. 751, 47 E. C. L.; and *R. v. Aldridge*, 3 F. & F. 781. But the law, however, has now been altered in conformity with the practice in civil cases under the Common Law Procedure Act, 1854, s. 27; for by the 28 Vict. c. 18, s. 8, it is enacted that comparison of a disputed writing with any writing proved to the satisfaction of the judge, to be genuine, shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

Where a party to a deed directs another person to write his name for him, and he does so, that is a good execution by the party himself. *R. v. Longnor*, 4 B. & Ad. 647, 24 E. C. L. In such cases the subscription *179] *of the name by the agent, and his authority to subscribe it, must be proved.²

Whether the evidence of persons skilled in detecting forgeries is admissible, in order to prove that a particular handwriting is not genuine, is a point not well settled.³ Such evidence was admitted in

¹ *Strother v. Lucas*, 6 Pet. 763; *Thomas v. Herlacker*, 1 Dall. 14; *Woodward et al. v. Spiller*, 1 Dana, 180. To prove handwriting, in general, a witness must know it by having seen the person write, or having corresponded with him; but in the case of ancient deeds or papers so old that no living witness can be produced, the genuineness of handwriting may be proved by an expert by comparison with papers whose genuineness is acknowledged. *West v. State*, 2 Zab. 212. When handwriting is to be proved by comparison, the standard used for the purpose must be genuine and original writing, and must first be established by clear and undoubted proof. Impressions of writings taken by means of a press, and duplicates made by a copying machine, are not original, and cannot be used as standards of comparison. *Commonwealth v. Eastman*, 1 Cush. 189. When the antiquity of the writing makes it impossible for any living witness to swear that he ever saw the party write, comparison with documents known to be in his handwriting is admissible. *Clark v. Wyatt*, 15 Ind. 271. *Contra*, *Hutchins's Case*, 4 Rog. Rec. 119. S.

On photographs. Photography is to be judicially recognized as a proper means of producing correct likenesses. *Udderzook v. Commonwealth*, 76 Pa. St. 340. They may be submitted to the jury to show the condition of the wall, the material thereof and the state of the mortar, under an indictment for the improper erection of a building. *People v. Buddensieck*, 4 N. Y. Crim. Rep. 230. Compare *Wharton's Criminal Evidence*, § 544, 9th ed., notes and cases cited; 1 *Greenleaf's Evid.*, § 6, 13th ed., notes and cases cited; 1 *Greenleaf's Evid.*, § 581, 14th ed., note (b). On misspelling. *United States v. Chamberlain*, 12 Blatchford, 390. Compare 9th ed. *Wharton's Crim. Evid.*, §§ 556, 558, 560, 847, 851 and notes.

² But proof of his handwriting is not enough; he must be produced himself. *McKee v. Myers's Ex'r*, Addis. 32. S.

³ An expert who speaks from skill is not competent to establish a forgery. *Bank of Penna. v. Jacobs*, 1 P. & W. 161; *Lodge v. Phipper*, 11 S. & R. 353. *Contra*, *Hess v. State*, 5 O. 5; *State v. Candler*, 3 Hawks, 393; *Moody v. Rowell*, 17 Pick. 490. As to the

Goodtitle v. Braham, 4 T. R. 497. But in a subsequent case, Lord Kenyon, who had presided in the case of *Goodtitle v. Braham*, rejected similar evidence. *Cary v. Pitt, Peake*, Ev. 99. It was admitted again by *Hotham, B., R. v. Cator*, 4 Esp. 117; and again rejected in *Gurney v. Langlands*, 5 B. & A. 330, 27 E. C. L. Upon the point coming before the court of K. B., in the last cited case, they refused to disturb the verdict, on the ground of the evidence having been rejected. In another case the Court of K. B. was equally divided on the question whether, after the witness had sworn to the genuineness of his signature, another witness (a bank inspector) could be called to prove that in his judgment the signature was not genuine, such judgment being solely founded on a comparison pending the trial with other signatures admitted to be those of the attesting witness. *Doe v. Suckermore*, 5 A. & E. 733, 31 E. C. L.; 2 N. & P. 16. See also *Fitzwalter Peer*, 10 Cl. & Fin. 198.

Proof of execution, when dispensed with. When a deed is thirty years old it proves itself, and no evidence of its execution is necessary.¹ *B. N. P.* 255; *Doe v. Burdett*, 4 A. & E. 1, 31 E. C. L. And so with regard to a steward's books of account if they come from the proper custody; *Wynne v. Tyrwhitt*, 4 B. & A. 376, 6 E. C. L.; letters; *Beer v. Ward*, 2 Phill. Ev. 246, 10th ed.; a will produced from the ecclesiastical court; *Doe v. Lloyd, Peake*, Ev. App. 41; a bond; *Chelsea W. Co. v. Cooper*, 1 Esp. 275; and other old writings; *Fry v. Wood, Selw. N. P.*, 13th ed., 495. Even if it appear that the attesting witness is alive, and capable of being produced, it is unnecessary to call him where the deed is thirty years old. *Doe v. Wolley*, 8 B. & C. 22, 15 E. C. L. If there is any erasure or interlineation in an old deed, it ought to be proved in the regular manner by the witness, if living, or by proof of his handwriting, and that of the party, if dead. *B. N. P.* 255. But perhaps this in strictness

testimony of experts in regard to handwriting: *Hess v. State*, 5 O. 5; *Commonwealth v. Webster*, 5 Cush. 295; *People v. Spooner*, 1 Denio, 343; *State v. Clark*, 12 Ired. 151; *Luning v. State*, 1 Chand. 178; *State v. Smith*, 32 Me. 369; *Wither v. Rowe*, 45 Me. 571; *Bacon v. Williams*, 13 Gray, 525; *Fulton v. Hood*, 10 Cas. 365; *Hyde v. Woodfolk*, 1 Clarke, 159; *Commonwealth v. Williams*, 105 Mass. 62; *State v. Shinnborn*, 46 N. H. 497; *State v. Ward*, 39 Vt. 225; *Vinton v. Peck*, 14 Mich. 287; *Nelson v. Johnson*, 13 Ind. 329; [*Commonwealth v. Beale*, 1 McArthur, 270.] Experts may be called to prove that the signature to a note, alleged to be forged, is not simulated. *People v. Hewitt*, 2 Park. C. R. 20. A witness, who was clerk in Chancery, and who testified that he had been accustomed to examine signatures as to their being genuine, cannot be permitted to give an opinion as a person skilled in detecting forgeries. *People v. Spooner*, 1 Denio, 333. Not only cashiers and officers of banks, but merchants, brokers, and others who habitually receive and pass the notes of a bank for a long course, may be received as experts to give their opinion. *State v. Check*, 13 Ired. 114. When the witness is an officer in a bank, whose business has been for many years to examine papers, with the view of detecting alterations, erasures, and spurious signatures, he may be asked his opinion. *Pate v. People*, 3 Gilm. 644. S.

¹ An agreement or deed under which land has been occupied and claimed for upwards of thirty years, may be given in evidence without proof of its execution by the subscribing witnesses. *Zeigler v. Houtz*, 1 W. & S. 533. S.

A party offering an instrument is not relieved from proving its execution to the jury, by the preliminary proof made before the judge to authorize its introduction. *Jordan v. State*, 52 Ala. 188.

is only necessary where the alteration on the face of it is material or suspicious. Where an old deed is offered in evidence without proof of execution, some account ought to be given of its custody; *B. N. P.* 255; or it should be shown that possession has accompanied it. *Gilb. Ev.* 97.

Where a party producing a deed upon a notice to produce, claims a beneficial interest under it, the party calling for the deed need not prove its execution. *Pearce v. Hooper*, 3 Taunt. 62. As where assignees produce the assignment of the bankrupt's effects. *Orr v. Morice*, 3 B. & B. 139, 7 E. C. L. See also *Carr v. Burdiss*, 5 Tyrwh. 136; 1 C. M. & R. 782; *Doe v. Wainwright*, 5 A. & E. 520, 31 E. C. L. But it must be an interest in the subject-matter of the cause; *Rearden v. Minter*, 5 M. & Gr. 204, 44 E. C. L.; *Collins v. Bayntum*, 1 Q. B. 117, 41 E. C. L.; and it must be still subsisting at the time of the trial. *Fuller v. Patrick*, 18 L. J. Q. B. 236. So in an action against the vendor of an estate, to recover a deposit in a contract for the purchase, and the defendant on notice produced the contract, Lord Tenterden, C. J., held that the plaintiff need not prove its execution. *Bradshaw v. Bennett*, 1 Moo. & R. 143. So where, in an action by a pitman against the owners of a colliery for wages due to him under an agreement usually *called a pit bond, the defendants produced the *180] agreement upon notice, *Cresswell, J.*, held that it was unnecessary for the plaintiff to call the attesting witness. *Bell v. Chaytor*, *Durham Summ. Ass.* 1843, MS.; 1 Carr. & K. 162, 47 E. C. L.

Where, however, a defendant to prove that he had been in partnership with the plaintiffs, offered in evidence a written contract purporting to be made by the plaintiffs and the defendant as partners with K., a builder, for work to be done by K. upon the premises, where the plaintiffs carried on the business in which the defendant alleged himself to have been a partner, and the document was in the plaintiff's custody, produced by them on notice, it was held that the contract was not admissible as an instrument under which the plaintiffs claimed an interest without proof of the execution. *Collins v. Bayntum*, 1 Q. B. 117, 41 E. C. L.

But where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. *Gordon v. Secretan*, 8 East, 548; *Doe v. Cleveland*, 9 B. & C. 864, 17 E. C. L. See further, *Rosc. N. P. Ev.* 158, 13th ed.

Stamps. Formerly, in criminal as well as in civil cases, a document, which by law is required to be stamped, could not be given in evidence without a stamp, unless the instrument itself were the subject-matter of the offence; but by the 33 & 34 Vict. c. 97, s. 17, which is as follows:—"Save and except as aforesaid, no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situated, or to any matter or thing done in any part of the United Kingdom, shall, *except in criminal proceedings*, be pleaded or given in evidence or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

*AIDERS, ACCESSORIES, ETC.

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What offences admit of accessories. With regard to the particular offences which admit of accessories, it is held that in high treason there can be no accessories, but all are principals, every act of incitement, aid, or protection, which in felony would render a man an accessory before or after the fact, in the case of high treason (whether by common law or by statute), making him a principal. *Foster*, 341; 4 Bl. Com. 35. So in all offences below felony there can be no accessories.¹ 1 Hale, P. C. 613; 4 Bl. Com. 36; *R. v. Greenwood*, 2 Den. C. C. 453; 21 L. J., M. C. 127. Also in manslaughter it has been said that there can be no accessories before the fact, for the offence is sudden and unpremeditated, and therefore if A. be indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. 1 Hale, 616, referring to *R. v. Bibitthe*, 2 Rep. 436 (b). In *R. v. Gaylor*, Dears. & B. C. C. 288, the above passage in Lord Hale's treatise was relied on, but Erle, J., said, "If the manslaughter be *per infortunium* or *se defendendo*, there is no accessory; but there are other cases in which there may be accessories." The conviction was upheld, but no judgment was delivered. With respect to accessories after the fact, it seems now settled (see *R. v. Greenacre*, 8 C. & P. 35, 34 E. C. L.; *R. v. Richards*, 2 Q. B. D. 311; 46 L. J., M. C. 200) that persons harboring and receiving a prisoner afterwards

¹ *State v. Westfield*, 1 Bail. 132; *Com v. Burns*, 4 J. J. Marsh. 182; *Curlin v. State*, 4 Yerg. 143. There are no accessories in petit larceny; but all concerned in the commission of the offence are principals. *Ward v. People*, 3 Hill, 395; 6 Hill, 144. [See *State v. Fox*, 94 N. C. 928. Among conspirators all are principals, *State v. Gooch*, 94 N. C. 987.] One who incites others to commit an assault and battery is guilty and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it. Whatsoever will make a man an accessory before the fact in felony, will make him a principal in treason, petit larceny, and misdemeanors. *State v. Lyburn*, 1 Brev. 397. See generally as to principals and accessories. *State v. Rand*, 33 N. H. 216; *Hately v. State*, 15 Ga. 346; *McCarty v. State*, 26 Miss. 299; *Brennan v. People*, 15 Ill. 511. S.

convicted of manslaughter become accessories. See *post*, tit. Manslaughter. It is said in the older books that in forgery all are principals: (see 2 East, P. C. 973;) but this must be understood of forgery at common law, which is a misdemeanor. *Id.*

Aiders and abettors, or principals in the second degree in felonies. Aiding and abetting a person to commit a felony is in itself a *substantive felony, whether the felony be such at common law *182] or by statute. *R. v. Tattersall*, 1 Russ. Cri. 157, 5th ed. An aider and abettor is also called a principal in the second degree. *R. v. Coalheaver*, 1 Lea. 64; *Fost.* 428.

To make a man principal in the second degree he must be *present* at the commission of the felony. *R. v. Soare*, 2 East, P. C. 974; *Russ. & Ry.* 25; *R. v. Davis*, *Id.* 113; *R. v. Badcock*, *Id.* 249, and other cases in the same report. By presence is meant such contiguity as will enable the party to render assistance to the main design.¹

With regard to what will constitute such a presence as to render a man a principal in the second degree, it is said by Mr. Justice Foster, that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned to him; some to commit the act, others to watch at proper distances, to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged, they are all, provided the act be committed, in the eye of the law present at it. *Foster*, 350. Thus where A. waits under a window, while B. steals articles in the house, which he throws through the window to A., the latter is a principal in the offence. *R. v. Owen*, 1 Moody, C. C. 96, stated *post*. There must be a participation in the act, for although a man be present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavor to prevent the felony, or apprehend the felon. 1 Hale, 439; *Foster*, 350. So a mere participation in the act, without a felonious participation in the design, will not be sufficient.

¹ *State v. McGregor*, 41 N. H. 407; *Brown v. Perkins*, 1 Allen, 89. The abettor must be in a situation actually to render aid, not merely where the perpetrator supposed he might. Proof of a prior conspiracy is not *legal presumption* of having aided, but only evidence. But if a conspiracy be proved, and a presence in a situation to render aid, it is a *legal presumption* that such presence was with a view to render aid, and it lies on the party to rebut it, by showing that he was there for a purpose unconnected with the conspiracy. *Commonwealth v. Knapp*, 9 Pick. 496. One who is present and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. It is necessary, in order to make him an aider or abettor, that he should do or say something showing his consent to the felonious purpose, and contributing to its execution. *State v. Hildreth*, 9 N. C. 440. [*Kemp v. Commonwealth*, 80 Va. 443.] When one is present at the commission of a felony, though he gives no active assistance, but only remains near for the purpose of watching and giving aid if necessary, he is properly charged as principal. *Doan v. State*, 26 Ind. 495; *State v. Squares*, 2 Nev. 226; *Commonwealth v. Chapman*, 11 Cush. 422. A person need not be present when a crime is committed to constitute him a principal. *Pritchard v. State*, 30 Ga. 757. An unmarried man, who is present aiding and abetting a friend in committing bigamy, may be convicted of that crime as principal in the second degree. *Boggus v. State*, 34 Ga. 275. S.

1 East, P. C. 257; R. v. Plumer, Kel. 109. Thus if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 Hale, 466.

Where several persons are in company together, engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in his guilt, unless the act done was in some manner in furtherance of the common intention. Several soldiers employed by the messenger of the secretary of state to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be. Having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony at all. Holt, C. J., observing upon this case, says, that they were all engaged in an unlawful act is plain, for they could not justify the breaking a man's house without first making a demand. Yet all those who were not guilty of stealing were acquitted, notwithstanding their being engaged in an unlawful act of breaking the door; for this reason, because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands. Anon., 1 Leach, 7 (n); 1 Russ. Cri. 162 (j), 5th ed. See also, R. v. White, R. & R. 99; R. v. Hawkins, 3 C. & P. 392, 14 E. C. L., *post*. Three men went out into a field to shoot, and placed a target in a tree eight feet from the ground. They laid down on the ground, and each fired at it in turn. Their rifles were sighted to shoot 950 yards, and would probably be deadly at a mile. A boy in an apple-tree 393 yards off was killed by one of the shots; but it was *uncertain which of the prisoners had shot him. They were [*183 all held to be guilty of manslaughter. Reg. v. Salmon, 6 Q. B. D. 79; 50 L. J., M. C. 25. It is, perhaps, open to doubt that if only one had fired his rifle all would have been equally guilty. Lord Coleridge, C. J., said, "the death resulted from the *action* of the three," and Stephen, J., said, "they unite to fire at the spot in question."

Where several are present, aiding and abetting, and the punishment of principals in the first and second degree is the same, an indictment may lay the fact generally as being done by all; 2 Hawk. c. 25, s. 4; even, as in cases of rape, where from the nature of the offence only one can be a principal in the first degree. And as in almost every case the punishment of all principals is the same, this is the course that is usually followed.

It has been long settled that all those who are present, aiding and abetting when a felony is committed, are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty; 2 Hale, 223; and may be convicted, though the party charged as principal in the first degree is acquitted. R. v. Taylor, 1 Leach, 360; Benson v. Offley, 2 Show. 510; 3 Mod. 121; R. v. Wallis, Salk. 334; R. v. Towl, R. & R. 314; 3 Price, 145; 2 Marsh. 465.

Accessories before the fact in felonies—bare permission—countermand. An accessory before the fact is defined by Lord Hale to be one who being absent at the time of the offence committed, does yet procure, counsel, command, or abet another to commit a felony.¹ 1 Hale, P. C. 615. The bare concealment of a felony to be committed, will not make the party concealing it an accessory before the fact. 2 Hawk. c. 29, s. 23. So words amounting to a bare permission will not render a man an accessory, as if A. says he will kill J. S., and B. says, "you may do your pleasure for me." Hawk. P. C. b. 2, c. 29, s. 16. The procurement must be continuing; for if before the commission of the offence by the principal, the accessory countermands him, and yet the principal proceeds to the commission of the offence, he who commanded him will not be guilty as accessory. 1 Hale, P. C. 618. If the party was *present* when the offence was committed he is not an accessory. *R. v. Gordon*, 1 Leach, 515; 1 East, P. C. 352. In such case he should be indicted as a principal. *R. v. Brown*, 14 Cox, C. C. 144. Several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places. *R. v. Barber*, 1 C. & K. 434, 12 E. C. L.

Accessories before the fact in felonies—by the intervention of a third person. A person may render himself an accessory by the intervention of a third person, without any direct communication between himself and the principal. Thus if A. bids his servant to hire somebody to murder B., and furnishes him with money for that purpose, and the servant hires C., a person whom A. never saw or heard of, who commits the murder, A. is an accessory before the fact. Fost. 121; *R. v. Macdaniel*, 1 Lea. 44; Hawk. P. C. b. 2, c. 29, ss. 1, 11; 1 Russ. Cri., 5th ed., 166; *R. v. Cooper*, 5 C. & P. 535, 24 E. C. L.

Accessories before the fact in felonies—degree of incitement. Upon the subject of the degree of incitement and the force of persuasion *used, no rule is laid down. That it was sufficient to *184] effectuate the evil purpose is proved by the result. On principle it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed, although the incitement had never taken place.

¹When an offence is committed in one State by means of an innocent agent, the employer is guilty as a principal, though he did no act in that State, and was at the time the offence was committed in another. *Adams v. The People*, 1 Comst. 173. S.

Where an accessory before the fact is charged in an information with hiring a certain person named to commit an arson, the information is sustained by proof that he hired the person named and another to join in the burning. *People v. Thompson*, 37 Mich. 118.

2 Stark. Ev. 9, 3rd ed. Where a man furnished a woman with corrosive sublimate at her request, which she took with intent to procure abortion, but he did not instigate her to take it, and his conduct was consistent with his having hoped that she would change her mind, it was held that he was not an accessory before the fact. *R. v. Fretwell*, 1 L. & C. 161; 31 L. J., M. C. 145. So a mere holder of stakes for a prize fight who is not present, but who afterwards paid over the stakes to the winner, was held not an accessory after the fact to the manslaughter of the man who was killed in the fight. *R. v. Taylor*, L. R. 2 C. C. 148; 44 L. J., M. C. 67.

Accessories before the fact in felonies—principal varying from orders given to him. With regard to those cases where the principal varies, in committing the offence, from the command or advice of the accessory, the following rules are laid down by Sir Michael Foster. If the principal totally and substantially varies: if, being solicited to commit a felony of one kind, he *wilfully and knowingly* commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. But if the principal *in substance* complies with the command, varying only in the circumstances of time, or place, or manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, or if present, a principal. A. commands B. to murder C. by poison; B. does it by sword or other weapon, or by some other means; A. is accessory to this murder, for the murder of C. was the principal object, and that object is effected. So where the principal goes beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such order or advice will be an accessory to that felony. A. upon some affront given by B. orders his servant to waylay him and beat him. The servant does so, and B. dies of the beating; A. is accessory to this murder. A. solicits B. to burn the house of C.; he does so, and the flames catching the house of D., that also is burnt. A. is an accessory to this felony. The principle in all these cases is, that though the event might be beyond the original intention of the accessory, yet as in the ordinary course of things, that event was the probable consequence of what was done under his influence, and at his instigation, he is in law answerable for the offence. Foster, 369, 370; see also 1 Hale, P. C. 617; Hawk. P. C. b. 2, c. 29, s. 18. Where the principal *wilfully* commits a different crime from that which he is commanded or advised to commit, the party counselling him will not, as above stated, be guilty as accessory. But whether, where the principal *by mistake* commits a different crime, the party commanding or advising him shall stand excused, has been the subject of much discussion.¹ It is said by Lord

¹ If W. lends A. a pistol and a short time afterwards A. kills M., and W. is present at the killing, and just before the firing exclaims to A., "Shoot him!" and just afterwards, "Shoot him again!" then W. is an aider and abettor of the crime, even though W. supposed that A. was shooting at J. and not at M. *Wynn v. State*, 63 Miss. 260. One engaged in an unlawful purpose is liable for the acts of all the others engaged therein which are the natural result of such purpose. *Weston v. Commonwealth*, 1

Hale, that if A. commands B. to kill C., and B. by mistake kills D., or else in striking at C. kills D., but misses C., A. is not accessory to *the murder of D., because it differs in the person. 1 Hale, P. *185] C. 617, citing 3 Inst. 51; R. v. Saunders, Plow. Com. 475. The circumstances of Saunders' case, cited by Lord Hale, were these: Saunders, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it to her to eat, and the wife having eaten a small part of it, and given the remainder to their child, Saunders making only a faint attempt to save the child, whom he loved, and would not have destroyed, stood by and saw it eat the poison, of which it soon afterwards died. It was held that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to the murder.

Upon the law as laid down by Lord Hale, and upon R. v. Saunders, Mr. Justice Foster has made the following observations, and has suggested this case: B. is an utter stranger to the person of C., and A. therefore takes upon himself to describe him by his stature, dress, etc., and acquaints B. when and where he may probably be met with. B. is punctual at the time and place, and D., a person in the opinion of B. answering the description, unhappily coming by, is murdered under a strong belief on the part of B. that he is the man marked out for destruction. Who is answerable? Undoubtedly A.: the malice on his part *egreditur personam*. The pit which he, with a murderous intention, dug for C., D. fell into and perished. Through his guilt, B., not knowing the person of C., had no other guide to lead him to his prey than the description of A., and in following this guide he fell into a mistake, which it is great odds any man in his circumstances might have fallen into. "I therefore," continued the learned writer, "as at present advised, conceive that A. was answerable for the consequences of the flagitious orders he gave, since that consequence appears in the ordinary course of things to have been highly probable." Foster, 370. With regard to Archer's case, the same learned author observes, that the judges did not think it advisable to deliver him in the ordinary course of justice by judgment of acquittal, but for example's sake kept him in prison by frequent reprieves from session to session, till he had procured a pardon from the crown. Id. 371. Mr. Justice Foster then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to rest. Did the principal commit the felony he stands charged with, under the flagitious advice, and was the advent, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind or upon a different subject? Foster, 372. See also Hawk. P. C. b. 2, c. 29, s. 22.

Accessories before the fact in felonies—how indicted. Before the

Pa. Sup. Ct. Dig. 335. See Anarchists' case, 12 N. E. Rep. 865; s. c. 6 Am. Crim. Rep. 570.

7 Geo. 4, c. 64, accessories could not, except by their own consent, be punished until the guilt of the principal offender was established.¹ It was necessary, therefore, either to try them after the principal had been convicted, or upon the same indictment with him, and the latter was the usual course. 1 Russ. Cri. 174, 5th ed. This statute is now repealed, and by the 24 & 25 Vict. c. 94, s. 1, it is enacted, that "whosoever shall become an accessory before the fact to any felony whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." By s. 2, "whosoever *shall counsel, procure or command any other person to commit [*186 any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to

¹ Commonwealth v. Andrews, 3 Mass. 136; State v. Groff, 1 Murph. 270. An accessory in a felony cannot be put upon his trial if the principal be dead without conviction. Commonwealth v. Phillips, 16 Mass. 423. See Russell on C. & M. 21, n. A. Where the principal and accessory are joined in one indictment, but are tried separately, the record of the conviction of the principal is *prima facie* evidence of his guilt, upon the trial of the accessory, and the burden of proof rests on the accessory, not merely that it is questionable whether the principal ought to have been convicted, but that he clearly ought not to have been convicted. Commonwealth v. Knapp, 10 Pick. 477. See also State v. Crank, 2 Bail. 66. [But where all are indicted as principals and tried separately, the conviction of one does not raise any presumption against the others who are tried subsequently. Coxwell v. State, 66 Ga. 309.] It is not necessary to set out the conviction of the principal in the indictment. State v. Crank, 2 Bail. 66. The court may in its discretion permit an accessory to be tried separately from the principal. State v. Yancey, 1 Const. Rep. 237. An accessory cannot be put on trial before the conviction of the principal, unless he consent thereto, or be put on his trial with his principal. State v. Pybus, 4 Hump. 422; Whitehead v. State, 16 Mass. 278; Commonwealth v. Woodward, Thac. Cr. Cas. 63; Sampson v. Commonwealth, 5 W. & S. 385. The record is *conclusive* evidence of the conviction of the principal, and *prima facie* evidence of his guilt. Studstill v. State, 7 Ga. 2; State v. Duncan, 6 Ired. 236. Though the accessory may be convicted before the principal, yet the offence of the principal must be alleged; Ulmer v. State, 14 Ind. 52; and proved; Ogden v. State, 12 Wis. 538. An accessory may be indicted without the conviction of the principal being averred, but his guilt must be averred, and the evidence must show that his guilt was legally established before the trial of the accessory. Holmes v. Commonwealth, 25 Pa. St. 221. Under an indictment as principal the defendant cannot be found guilty as an accessory after the fact. People v. Gassaway, 28 Cal. 404. An accessory to felony cannot be convicted upon an indictment charging him as principal. State v. Wycoff, 2 Vr. 65. S.

The admissions and confessions of any of the principals are admissible to prove the guilt of the accessory; they are not to be limited in their application to the question of the guilt of the principals. Territory v. Dwenger, 2 New Mexico, 73. But where these declarations have been made in the absence of the defendant, they are not admissible against him until other evidence than that of the principal has been produced implicating the accomplice in the offence. Casey v. State, 37 Ark. 67. A principal offender is before judgment of conviction of felony a competent witness against an accessory in the same. Keech v. State, 15 Fla. 591.

² For a similar statute in Pennsylvania see Campbell v. Commonwealth, 84 Pa. St. 187; Brandt v. Commonwealth, 94 Pa. St. 290. In Illinois see the Anarchists' case, 12 N. E. Rep. 865; s. c. 6 Am. Crim. Rep. 570.

justice, and may thereupon be punished in the same manner as an accessory before the fact to the same felony, if convicted as an accessory, may be punished."

Soliciting and inciting a person to commit a felony is not a substantive felony under this section, unless the felony is actually committed, but only a misdemeanor, and it is doubtful whether a soliciting and inciting is equivalent to a counselling and procuring. *R. v. Gregory*, L. R., 1 C. C. R. 77; 36 L. J., M. C. 60.

It was decided upon the 11 & 12 Vict. c. 46, s. 1 (which is in the same terms as the 24 & 25 Vict. c. 94, s. 1, and was passed to remedy a defect in the 7 Geo. 4, c. 64), that a person charged as an accessory before the fact may be convicted even though the principal be acquitted. *R. v. Hughes*, Bell, C. C. 242. The two first counts charged A. & B. with stealing, and the third count charged B. with receiving. No evidence was offered against A., who was acquitted and called as a witness. The evidence went to show that B. was an accessory *before* the fact, and the jury found a general verdict of guilty. It was held that the conviction was good. Erle, J., said, "We consider that being an accessory before the fact now stands as a substantive felony, and that now the conviction of an accessory would stand good, and no wrong be done him, though he should be tried before the principal."

By the 24 & 25 Vict. c. 94, s. 5, "if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory either before or after the fact, in the same manner as if such a principal felon had been attainted thereof, notwithstanding such principal shall die or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted." By the 24 & 25 Vict. c. 94, s. 6 (replacing the 14 & 15 Vict. c. 100, s. 15), "any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall be in custody or amenable to justice."

Accessories after the fact in felonies. An accessory after the fact, says Lord Hale, is where a person knowing the felony to be committed by another, receives, relieves, comforts, or assists the felon; 1 Hale, P. C. 618; whether he be a principal, or an accessory before the fact. 2 Hawk. c. 29, s. 1; 3 P. Wms. 475.¹ But a *feme covert* does not become an accessory by receiving her husband. This,

¹ To constitute an accessory after the fact, the aid and assistance must be given after the felony is fully completed; and hence a party rendering assistance to another after the mortal blow has been struck, and before death has taken place, cannot be convicted as an accessory to the crime of murder after the fact; his offence is that of an accessory after the fact to the crime of an assault and battery with intent to kill—the crime of murder not being complete until the death of the party takes place. *Harrel v. State*, 39 Miss. 702. S.

however, is the only relationship which will excuse such an act, the husband being liable for receiving the wife. 1 Hale, P. C. 621. So if a master receives his servant, or a servant his master, or a brother his brother, they are accessories, in the same manner as a *stranger would be. Hawk. P. C. b. 2, c. 29, s. 34. If a husband and wife knowingly receive a felon, it shall be deemed [*187 to be the act of the husband only. 1 Hale, P. C. 621. But if the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband. Id.

With regard to the acts which will render a man guilty as an accessory after the fact, it is laid down, that generally any assistance whatever, given to a person known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where a person assists him with a horse to ride away with, or with money or victuals to support him in his escape: or where any one harbors and conceals in his house a felon under pursuit, in consequence of which his pursuers cannot find him; much more, where the party harbors a felon, and the pursuers dare not take him. Hawk. P. C. b. 2, c. 29, s. 26. See *R. v. Lee*, 6 C. & P. 536, 25 E.C.L. So a man who employs another person to harbor the principal may be convicted as an accessory after the fact, although he himself did no act to relieve or assist the principal. *R. v. Jarvis*, 2 Moo. & R. 40. So it appears to be settled that whoever rescues a felon imprisoned for the felony, or voluntarily suffers him to escape, is guilty as accessory. Hawk. P. C. b. 2, c. 29, s. 27. In the same manner conveying instruments to a felon, to enable him to break gaol, or to bribe the gaoler to let him escape, make the party an accessory. But to relieve a felon in gaol with clothes or other necessities is no offence, for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law. 4 Bl. Com. 38.

Merely suffering the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission. 9 H. 4, st. 1; 1 Hale, 619. So if a person speak or write, in order to obtain a felon's pardon or deliverance; 26 Ass. 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 Inst. 139; 1 Hale, 620; or even if he himself agree for money not to give evidence against the felon; Moo. 8; or know of the felony, and do not discover it; 1 Hale, 371, 618; none of these acts will make a party an accessory after the fact.

The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As if one wounded another mortally, and after the wound given, but before death ensued, a person assisted or removed the delinquent, this did not, at common law, make him accessory to the homicide, for till death ensued, there was no felony committed. Hawk. P. C. b. 2, c. 29, s. 35; 4 Bl. Com. 38.

In order to render a man guilty as accessory, he must have notice,

either express or implied, of the principal having committed a felony. Hawk. P. C. b. 2, c. 29, s. 32. It was formerly considered that the attainder of a felon was a notice to all persons in the same county of the felony committed, but the justice of this rule has been denied. Hawk. P. C. b. 2, c. 29, s. 83. It was observed by Lord Hardwicke, that though this may be some evidence to a jury, of notice to an accessory in the same county, yet it cannot, with any reason or justice, create an absolute presumption of notice. *R. v. Burridge*, *188] 3 P. Wms. 495. In order to support a charge of receiving, *harboring, comforting, assisting, and maintaining a felon, there must be some act proved to have been done to assist the felon personally; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen. *R. v. Chapple*, 9 C. & P. 355, 38 E. C. L. As to harboring thieves in public-houses and brothels, see 34 & 35 Vict. c. 112, ss. 10, 11, "Prevention of Crimes Act, 1871."

Accessories after the fact in felonies—how indicted. With regard to the trial of accessories after the fact, the 24 & 25 Vict. c. 94, s. 3, enacts that "whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in a like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished." The "substantive" felony of which the accessory after the fact may be convicted is the felony of being an accessory after the fact, and does not mean the principal felony. *R. v. Fallon*, 32 L. J., M. C. 66; 1 L. & C. 217. Where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed. *R. v. Brannon*, 14 Cox, C. C. 394.

Sections 5 & 6 of the 24 & 25 Vict. c. 94, *supra*, p. 186, apply to accessories *after* as well as *before* the fact.

By the 24 & 25 Vict. c. 94, s. 4, "every accessory after the fact to any felony (except where it is otherwise specially provided), whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be liable (at the discretion of the court) to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labor; and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to such punishment: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

An accessory may avail himself of every matter, both of law and fact, to counteract the guilt of his principal.¹ Foster, 365; 1 Russ. Cri. 183, 5th ed.; and see *post*, Receiving Stolen Goods.

Aiders and abettors as principals in the second degree in misdemeanors. Aiding and abetting in the commission of a misdemeanor is itself a misdemeanor. But it has always been the custom to indict principals in the second degree in misdemeanors, the same way as principals in the first degree. And now by the 24 & 25 Vict. c. 94, s. 8, it is enacted that "whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender." The same provision is repeated in the several new statutes. As to what amount of participation will constitute aiding and abetting *a prize-fight, see *R. v. Coney*, 8 Q. B. D. 534; 51 L. J., M. C. [*189 66, set out *post*, title Manslaughter.

Accessories in misdemeanors. In misdemeanors all are principals, and there are no accessories in the technical sense of that term. Some difficulty about this was created by the cases of *R. v. Elsee*, Russ. & Ry. 142, and *R. v. Page*, 1 Russ. Cri. 235, 5th ed.; but the law was set right by *R. v. Greenwood*, 2 Den. C. C. 453; L. J., M. C. 127.

Venue and jurisdiction. By 24 and 25 Vict. c. 94, s. 7, "where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory, either before or after the fact, to any such felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become accessory, shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea and on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without."²

¹ *United States v. Wood*, 4 Wash. C. C. Rep. 440; s. c. 3 Wheeler's C. C. 325. S.

² An accessory before the fact to a felony procured in another State to be committed within New Hampshire, cannot be tried for the offence of procuring its commission, in the county in New Hampshire within which the principal offence is committed. *State v. Moore*, 6 Fost. 448. Where the offence of a principal is committed in one county, and that of the accessory in another, the accessory may be tried in the county where he performed the act which made him an accessory. *Baron v. People*, 1 Park. C. R. 246. S.

By the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3, s. 5), any person who within or (being a subject of Her Majesty) without Her Majesty's dominions by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any crime under this act, shall be guilty of felony, and shall be liable to be tried and punished for that crime, as if he had been guilty as a principal.

*PRACTICE.

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1. PROCEEDINGS BEFORE THE HEARING.

Preferring and finding bills of indictment. Before the passing of the 19 & 20 Vict. c. 54, it was necessary to swear the witnesses in open court before they could give evidence before the grand jury; but now, by s. 1 of that act, it is made "lawful for the foreman of every grand jury in England and Wales, and he is authorized and required to administer an oath to all persons whomsoever, who shall appear before such grand jury to give evidence in support of any bill of indictment, and all such persons attending before any grand jury to give evidence may be sworn and examined on oath by such grand jury touching the matters in question; and every person taking any oath or affirmation in support of any bill of indictment who shall wilfully swear or affirm falsely shall be deemed guilty of perjury; and the name of every witness examined, or intended to be so examined, shall be indorsed on such bill of indictment; and the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment." By s. 3, "the word 'foreman' shall include any member of such grand jury who may for the time being act on behalf of such foreman in the examination of witnesses."

It has been said that two indictments for the same offence, one for the felony under a statute, and the other for the misdemeanor at common law, ought not to be preferred or found at the same time. *R. v. Doran*, 1 Leach, 538; *R. v. Smith*, 3 C. & P. 413, 14 E. C. L. But where two indictments had been found, one for stealing and another for a misdemeanor, and it was sworn that they were for the same identical offence, the Q. B. (into which court the indictments had been removed by *certiorari*), refused to grant a rule for quashing one or both of such indictments. *R. v. Stockley*, 3 Q. B. 328, 43 E. C. L.

The grand jury are not usually very strict as to evidence, as they only require that a *prima facie* case should be established; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist upon the same strictness of proof as must be observed at the trial, it may be prudent in all cases to be

*192] *provided, at the time the bill is preferred, with the same evidence which is intended afterwards to support the indictment.

When the grand jury found, upon a bill preferred against A. and B. for murder, a true bill against A. for murder, and against B. for manslaughter, *Campbell, C. J.*, held that the finding against A. was good, and that against B. a nullity, and directed that a fresh bill

should be preferred against B. for manslaughter. *R. v. Bubb*, 4 Cox, C. C. 455. Where the grand jury have found a bill, the judge before whom the case comes on to be tried ought not to inquire whether the witnesses were properly sworn previously to their going before the jury; and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge only. *R. v. Russell*, Carr. & M. 247, 41 E. C. L.¹

As to the grand jury in Ireland, see the 1 & 2 Vict. c. 37; also *O'Connell v. Reg.*, 11 C. & F. 155.

If the bill be not found, a fresh bill may afterwards be preferred to a subsequent grand jury, 4 Bla. Comm. 305. And it would seem from Bacon's Abridgment, Indictment D., that where a bill for one offence, such as murder, is ignored by the grand jury, another bill against the same party, relating to the same subject-matter, but charging another offence, such as manslaughter, may be preferred to and found by the same grand jury; and this course is frequently adopted in practice.

But if the grand jury at the assizes or sessions have ignored a bill, they cannot find another bill at the same assizes or sessions, against the same person for precisely the same offence, and if such other bill be sent before them they should take no notice of it. *R. v. Humphreys*, Carr. & M. 601, 41 E. C. L.; *R. v. Austin*, 4 Cox, C. C. 385.

Where a true bill has been found by the grand jury at quarter sessions for a rape, the person against whom the bill is found may be tried upon it at the assizes. *R. v. Allum*, 2 Cox, C. C. 62.

A grand jury ought not to ignore a bill on the ground of insanity, but if they believe that the acts done, if committed by a sane person, would have amounted to the offence charged, it is their duty to find the bill, otherwise the court cannot order the party to be detained in custody under the 39 & 40 Geo. 3, c. 94, s. 2 (*infra*, p. 199). *R. v. Hodges*, 8 C. & P. 195, 34 E. C. L.

By the Act to prevent vexatious indictments for certain misdemeanors, 22 & 23 Vict. c. 17, s. 1: "no indictment for perjury, subornation of perjury, conspiracy, obtaining by false pretences, keeping a gambling-house, keeping a disorderly house, or an indecent assault, is to be presented to, or found by any grand jury unless the person presenting it has been bound by recognizance to prosecute or give evidence against the accused, or unless the accused has been committed to, or detained in custody, or bound by recognizance to appear and answer to the indictment, or unless the indictment be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of her Majesty's

¹ Hearing and information are not necessary to support an indictment. *Commonwealth v. Clarke*, 1 Pa. Sup. Ct. Dig. 24. It is no defence upon the trial that the indictment was found by the grand jury on insufficient testimony. *Cotton v. State*, 43 Tex. 169. But on evidence that the grand jury was improperly influenced, the indictment will be set aside. Their affidavits to the contrary are not admissible. *People v. Sellick*, 4 N. Y. Crim. Rep. 329. As to the time of challenging the grand jury, see *People v. Geiger*, 49 Cal. 643.

attorney or solicitor-general, or (in the case of an indictment for perjury) by the direction of any court, judge, or public functionary, authorized by the 14 & 15 Vict. c. 100, so to direct." This Act is amended by the 30 & 31 Vict. c. 35, ss. 1, 2,—see *post*, Appendix of Statutes; and misdemeanors by fraudulent debtors are now within the acts. See *post*, "Bankrupts." Offences under the Newspaper Libel Act are also within the Vexatious Indictments Act, see 44 & 45 *193] *Vict. c. 60, s. 6. The consent in writing of the judge may be given *ex parte*, *R. v. Bray*, 32 L. J., M. C. 11. An indictment contained two counts for obtaining goods by false pretences, one false pretence being laid on the 26th, the other on the 29th September. The defendant had been committed by the magistrates on the charge relating to the 26th, but not on that relating to the 29th. He moved to have the indictment or its second count quashed, which was refused. Evidence was admitted on both counts and a separate conviction and sentence passed on each. It was held upon a case reserved that the second count should have been quashed, and that as the evidence relating to it was inadmissible on the trial of the first count, the conviction on the first count was also bad. *R. v. Fuidge*, L. & C. 390; 33 L. J., M. C. 74. It is stated that this case suggested the passing of the 30 & 31 Vict. c. 35, s. 1, see 2 Chitty's Statutes, 297, 4th ed., and since the passing of that Act, it would seem that the consent to add new counts to an indictment must not be general so as to authorize the prosecution to add any number of counts, nor must the consent include counts founded on facts and evidence which were not disclosed before the committing magistrate. *R. v. Bradlaugh*, 15 Cox, C. C. 156; 47 L. T. p. 477. An attempt to obtain money or other property by false pretences is not within this statute. *R. v. Burton*, 13 Cox, C. C. R. 71.

It is not necessary that the indictment should state that the provisions of the sections have been complied with. *R. v. Knowlden*, 5 B. & S. 532, 117 E. C. L.; 33 L. J., M. C. 219.

As to this section with respect to perjury, see *post*, "Perjury."

Count for previous conviction. Various statutes have been passed permitting a statement to be made in the indictment that the prisoner has been previously convicted, and providing modes of proving that statement, and for arraigning the prisoner thereon, see *post*, p. 224.

With respect to the mode of stating the previous conviction in the indictment, the 7 & 8 Geo. 4, c. 28, s. 11, provided that it should be sufficient to state that the offender was at a certain time and place convicted of a felony without otherwise describing the previous felony. The Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 116, provided that in any indictment for an offence under that act, it should be sufficient to state that the offender was at a certain time or place convicted of felony or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction without otherwise describing the previous felony, misdemeanor, offence, or offences. In offences

relating to coin it is provided by the 24 & 25 Vict. c. 99, s. 37, that it shall be sufficient in any indictment after charging the subsequent offence to state the substance and effect only (omitting the former part) of the indictment and conviction for the previous offence (see *R. v. Martin*, L. R., 1 C. C. R. 214; 39 L. J., M. C. 31, *post*, "Coin;" and see the new form for an indictment under s. 12 of the above statute in consequence of the decision in this case. Arch. Criminal Pl., 18th ed. 792.) In both the Larceny Act and the Coinage Act it is necessary that the subsequent offence should be first stated; but in other cases it is immaterial which offence is first stated, *R. v. Hilton*, 28 L. J., M. C. 28. The effect of alleging a previous conviction in an indictment for uttering counterfeit coin is to make the offence charged a felony, and if the jury negative the previous conviction, the prisoner cannot be found guilty on the charge of felony, as it is not proved, nor of a misdemeanor of uttering, as the indictment is for a felony. *R. v. Thomas*, L. R. 2 C. C. R. 141; 44 L. J., M. C. 42.

The state of the law with respect to the power to insert a count for a previous conviction is peculiar. The Act of Geo. 4 enables a count for previous conviction for *felony only* to be inserted in an indictment for *felony only*. The Larceny Act (sect. 116, *supra*) seems to permit a count for previous conviction for *any felony, misdemeanor, or offence punishable by summary conviction* to be inserted in an indictment for *any offence under that act*. The Coinage Act permits a count for previous conviction for *any offence against that act* to be inserted in an indictment for *any offence against that act*. The result of these Acts is that in indictments for misdemeanors and offences not felonies, which are not included in the Larceny or Coinage Acts, a previous conviction cannot be charged at all, and under the Coinage Act only a previous conviction for offences against that act. In *R. v. Deane*, 46 L. J., M. C. 155, it has however been held that in consequence of the 27 & 28 Vict. c. 47, s. 2, a count for a previous conviction of *felony* may be inserted in an indictment for any *crime punishable with penal servitude*, and therefore in an indictment for false pretences, and the decision in *R. v. Garland*, 11 Cox, C. C. 224 (Irish), is thus overruled. It is still doubtful whether in misdemeanors under the Larceny Act not punishable by penal servitude a previous conviction can be inserted in the indictment.

In cases of receiving stolen goods, etc., it is not necessary under the 34 & 35 Vict. c. 112, s. 19, to charge in the indictment the previous conviction of the person so accused, but seven days' notice of the intention to prove the conviction must be given to the accused. In order to affect the judgment of the court as to the term of penal servitude to be awarded, the previous conviction must be stated in the indictment, see *post*, p. 233.

Copy of indictment. A prisoner is not entitled as of right to a copy of the indictment in order to draw up his plea, but the court will direct the indictment to be read over slowly, in order that it may be

taken down. *R. v. Parry*, 7 C. & P. 836, 32 E. C. L. But the counsel for the prosecution may give a copy of the indictment with a view of saving time. *Id.* See also *R. v. Newton*, 1 C. & K. 469, 47 E. C. L. In the case of an acquittal on a prosecution for felony, a copy of the indictment cannot be regularly obtained without an order from the court. The rule is confined to cases of felony. In prosecutions for misdemeanors the defendant is entitled to a copy of the record as a matter of right, without a previous application to the court. *Morrison v. Kelly*, 1 Blackst. 385; *Evans v. Phillips*, MS.; 2 Selw. N. P. 952; 2 Phill. Ev. 10th ed., 162. See further, 3 Russ. Cri. 427, 428, 5th ed (f), note by Greaves.¹

Particulars. With respect to the general law relating to the delivery of particulars in criminal cases, very little is to be found in the books. Now that the indictment is in many cases perfectly general, it seems to be a matter of right that the prisoner should have some information as to the particular charges intended to be brought against him. Carr. Supp. 321. Those offences in which the right of the accused to particulars has been recognized, and in which they are most commonly required, are barratry, nuisance, *195] *offences relating to highways, conspiracy, and embezzlement. The law so far as relates to each of these classes will be found under those titles. See especially, as to barratry, Carr. Supp. 321. The learned author of this work, in speaking of the generality allowed in indictments for larceny and embezzlement, says, "Under these circumstances, it is hardly possible for an innocent man to know what charges he has to meet, because all of them may be included in one indictment; and, when there, they are wholly indefinite as to time, place, sum, and person, and from whom the money was received. It is true that the prisoner may, in his defence, say, that if he had had a knowledge of what particular sums he was charged with embezzling, he could have procured the attendance of witnesses to show that he had applied those moneys to his master's use, and not to his own; but as this may be as easily said by the most guilty man, as by the most innocent, it would not be much attended to by the jury."

It seems that the proper course is for the defendant to apply to the prosecutor in the first instance for particulars of the offence; and, if they are refused, to apply to the court or a judge, upon an affidavit of that fact, and that the accused is unable to understand the precise charge intended. *R. v. Bootyman*, 5 C. & P. 300, 24 E. C. L.; *R. v. Hodgson*, 3 C. & P. 422, 14 E. C. L.; *R. v. Marquis of Downshire*, 4 A. & E. 699, 31 E. C. L. The application may be made to the judge at the assizes; *R. v. Hodgson*, *supra*, where Vaughan, B., said he would, if necessary, put off the trial in order that particulars might be delivered. In barratry, however, it seems to be necessary to give

¹ By the Illinois statute it is mandatory upon the grand jury to indorse upon the indictment the names of those witnesses on whose testimony the indictment was found. *Andrews v. People*, 117 Ill. 195. See *People v. Quick*, 58 Mich. 321.

particulars without any demand. 1 Curw. Hawk. 476, s. 13; Carr. Supp., *ubi supra*.¹

If particulars have been delivered, the prosecutor will not be allowed to go into other charges than those contained therein. If particulars have been ordered, but not delivered, it seems that the prosecutor cannot be precluded from giving evidence on that account. *R. v. Esdaile*, 1 F. & F. 213-227. The proper course is to apply to put off the trial.

Jurisdiction. So far as *locality* is concerned, the jurisdiction of the court generally depends upon the venue; that is, the venue must be laid within the area over which the court has jurisdiction; and this venue must be that indicated by the place where the offence is actually committed, unless there be some rule or statute which permits any other venue. These are very numerous, and the whole subject will be found discussed under a separate chapter. See tit. "Venue." (As to the holding of Winter Assizes, see 39 & 40 Vict. c. 37, and the Orders in Council, Oct. 23rd, 1876. L. R., Weekly Notes, Nov. 4, 1876.)

So far as *power* is concerned, the only distinction to which it is necessary here to advert is that relating to courts of quarter sessions. The jurisdiction of these courts is now regulated by the 5 & 6 Vict. c. 38, s. 1, which enacts that, after the passing of that act, "neither the justices of the peace acting in and for any county, riding, division or liberty, nor the recorder of any borough, shall, at any session of the peace, or any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas [now penal servitude] for life, or for any of the following offences: 1, misprison of treason; 2, offences against the Queen's title, prerogative, person, or *government, or against either house of Parliament; 3, offences sub- [*196] ject to the penalties of *præmunire*; 4, blasphemy and offences against religion; 5, administering and taking unlawful oaths; 6, perjury and subornation of perjury; 7, making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor; 8, forgery; 9, unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze or fern; 10, bigamy and offences against the laws relating to marriage; 11, abduction of women and girls; 12, endeavoring to conceal the birth of a child; 13, offences against any provision of the laws relating to bankrupts and insolvents; (repealed by 32 & 33 Vict. c. 62. See *post*, tit "Bankrupts") 14, composing, printing, or publishing blasphemous, seditious, or defamatory libels; 15, bribery; 16, unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence

¹ The court will not grant a bill of particulars unless satisfied of its necessity to a fair and impartial trial. *Commonwealth v. McClure*, 1 County Ct. Rep. (Pa.) 182; *Commonwealth v. Wilson*, 1 Chester C. R. 538.

which such justices or recorder respectively have or has jurisdiction to try when committed by one person; 17, stealing, or fraudulently taking, or injuring, or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein; 18, stealing, or fraudulently destroying, or concealing wills, or testamentary papers, or any document or written instruments, being, or containing evidence of the title to any real estate, or any interest in lands, titles, tenements or hereditaments."

By the 24 & 25 Vict. c. 96, s. 87, offences mentioned in the twelve previous sections (see tit. "Agents, Bankers, etc., Frauds by") are not triable at any quarter sessions.

In *Smith v. Reg.*, 18 L. J., M. C. 207, 212, it was held that the jurisdiction of a recorder of a borough was not suspended by the arrival of the judges of assize in the same county, and that this would apply equally to the jurisdiction of the quarter sessions of the county. But Coleridge, J., said it was better for the quarter sessions not to proceed with the trial of prisoners after the business of the assizes had commenced.

If the court have not jurisdiction, the defendant may take advantage either by a plea to the jurisdiction, or, if it appear on the record, by demurrer, or, as it seems, by motion in arrest of judgment, or by a writ of error. *R. v. Hewitt*, R. & R. 158. But the objection may also be taken under the general issue, and this is by far the most usual course.¹

Certiorari. Any proceeding in a criminal court may be removed by a writ of *certiorari* into the Court of Queen's Bench, which writ is issued by that court. It is demandable as of right by the crown; *R. v. Eaton*, 2 T. R. 89; and issues, as of course, where the attorney-general or other officer of the crown applies for it, either as prosecutor, or as prosecuting, the defence on behalf of the crown; *Id.*; *R. v. Lewis*, 4 Burr. 2458; and this, even though the *certiorari* is expressly taken away by statute; for, unless named, the crown is not bound. By analogy the *certiorari* was formerly granted, almost of course, to private prosecutors, who were said to represent the crown. But now by the 5 & 6 Will. 4, c. 33, s. 1, no writ of *certiorari* can issue from the court of Q. B. at the instance of any one, except the attorney-general, without motion first made in court, or to a judge in chambers, and leave obtained, in the same manner as if the *197] application were made by the defendant. By the 16 & 17 Vict. c. 30, s. 4, after reciting that by reason of the establishment of a court of criminal appeal, the removal of indictments by writ of *certiorari* is seldom necessary for the decision of questions of law, but is nevertheless sometimes resorted to for the purpose of expense and delay, it is enacted, "that no indictment, except indictments against bodies corporate not authorized to appear by attorney in the court in which

¹ Where the defendant was asked by the justice whether he wished a trial by jury, and declared that he did not, it is no violation of his constitutional right, that he was tried by the justice. *Ward v. People*, 30 Mich. 116.

the indictment is preferred, shall be removed into the court of Q. B., or into the Central Criminal Court by writ of *certiorari*, either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the crown), unless it be made to appear to the court from which the writ is to issue, by the party applying for the same, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same." By s. 5 no *certiorari* is to issue unless recognizance is given for the payment of costs. See *R. v. Wilkes*, 5 E. & B. 690, 85 E. C. L.; *R. v. Jewell*, 7 E. & B. 140, 90 E. C. L.; *R. v. Mayor of Manchester*, Id. 453.

It has been held that the mere necessity for a special jury was not alone sufficient ground for granting the writ; *R. v. Green*, 1 Wil. Wol. & Hod. 35. A much stronger case of difficulty would have to be made out now than formerly; see *R. v. Wartnaby*, 2 Ad. & E. 435, 22 E. C. L.; *R. v. Duchess of Kingston*, Cowp. 283. The rule has been granted on the ground of a reasonable probability of partiality in the jurisdiction within which the indictment would otherwise be tried, in cases where the charge had been made the subject of much public discussion; *R. v. Mead*, 3 D. & R. 301; *R. v. Lever*, 1 Wil. Wal. & Hod. 35; where the person accused is a person of influence in the court below; *Reban v. Trevor*, 4 Jur. 292; *R. v. Grover*, 8 Dowl. P. C. 325; *R. v. Jones*, 2 Har. & W. 293; where the prosecutor or his attorney is sheriff or undersheriff; *R. v. Webb*, 2 For. 1068; *R. v. Knatchbull*, 1 Selw. 150. The affidavit on which the application is made should state the particular facts relied on very explicitly. *R. v. Green*, *ubi supra*; *R. v. Jowle*, 5 Ad. & E. 539, 31 E. C. L.

By the 60 Geo. 3, c. 4, s. 4 (repealed 14 & 15 Vict. c. 100, s. 26), the *certiorari* might be applied for before the indictment was found for a misdemeanor. The effect of the writ is to remove all proceedings described therein, which have taken place between the *teste* and return. *R. v. Battams*, 1 East, 298; 2 Hawk. c. 27, s. 23. Where there are several defendants, all should concur either on their own behalf, or on behalf of the applicant. *R. v. Hunt*, 2 Chit. Rep. 130.

If the defendant remove an indictment by *certiorari* he will, if convicted, be liable for costs to the prosecutor or party grieved, on the counts on which he is convicted. 5 & 6 W. & M. c. 11, s. 3; (enlarged by 5 & 6 Will. 4, c. 33, s. 2; 16 & 17 Vict. c. 30, s. 5, see preceding page); *R. v. Hawdon*, 11 Ad. & E. 143, 39 E. C. L.; *R. v. Oastler*, L. R. 9 Q. B. 132; 43 L. J., M. C. 89. See 1 Burn's Jus. 30th ed. 653; Arch. C. L. 105, 18th ed.

As to writs of *certiorari*, to remove trials to and from the Central Criminal Court, see the 4 & 5 Will. 4, c. 36, s. 16; 9 & 10 Vict. c. 24, s. 3; 19 & 20 Vict. c. 16; *R. v. Castro*, 6 Ap. Ca. 229; 50 L. J., H. L. 497; *post*, tit. "Venue."

*198] *As to costs in indictments for non-repair of highways removed by *certiorari*, see *post*, tit. "Highways, Costs, etc."

As to the practice relating to writs of *certiorari* generally, see *Corner's Crown Practice*.

Arraignment in General. For arraignment on previous conviction, see *post*, p. 224. A person indicted for felony must in all cases appear in person and be arraigned, but this does not apply to misdemeanors. 1 Chitt. C. L. 414; 4 Bl. C. 375. On an indictment or information for a crime *less than felony*, the defendant may, by favor of the court, appear by attorney, and this he may do as well before plea pleaded as afterwards unto conviction. *R. v. Bacon*, 1 Lev. 146; *Keilw.* 165.¹ In all cases of felony the prisoner must take his place within the dock. *R. v. Douglass*, Carr. & M. 193, 41 E. C. L.; and see, also, *R. v. Zulueta*, 1 C. & K. 215, 47 E. C. L.²

The arraignment consists of three parts; the calling the prisoner to hold up his hand, the reading over the indictment to him, and the asking him whether he is guilty or not guilty. 2 Hale, 219.³ If the prisoner upon his arraignment refuse to answer, it becomes a question whether it is of malice, or whether he is mute by the visitation of God. The court will in such case direct a jury to be impanelled, who are immediately returned, *R. v. Jones*, 1 Leach, 102, from amongst the bystanders. 1 Chitty, C. L. 424. The prisoner's counsel may address the jury and call the witnesses, for the affirmative of the issue is on him. *R. v. Roberts*, Carr. C. L. 57. Where the verdict of *mute by the visitation of God* is returned, the court will order the trial to proceed, if the prisoner is competent in intellect, and can be made to understand the nature of the proceedings against himself. Thus where it appeared that a prisoner, who was found mute, had been in the habit of communicating by means of signs, and a woman was called who stated that the prisoner was capable of understanding her by means of signs, he was arraigned, put upon his trial, convicted of simple larceny, and received sentence of transportation. *R. v. Jones*, 1 Leach, 102; 1 Russ. by Greav., 4th ed., p. 11, note (m). So where a prisoner, who was found mute, could read and write, the indictment was handed to him with the usual questions written upon paper.

Bloomington v. Heiland, 67 Ill. 278.

¹ *People v. Beauchamp*, 49 Cal. 41.

² Where the defendant, when arraigned, obtains time to plead, he waives all defects. *People v. Lightner*, 49 Cal. 226. Arraignment and plea are necessary steps to a valid and regular conviction. They are an essential ingredient of the verdict. Their omission cannot be supplied by a presumption of regularity. *Grigg v. People*, 31 Mich. 471. Where there is no arraignment on record, the judgment will be reversed. *State v. Vanhook*, 88 Mo. 105. The trial of a prisoner without a plea is erroneous, but the error must be presented by a motion for a new trial, not by a writ of error. *Billings v. State*, 107 Ind. 54. It is no ground for setting a judgment of conviction aside, where the trial has been held as if on a plea of not guilty, and the defendant has neglected to plead. *State v. Greene*, 66 Ia. 11; *State v. Hayes*, 67 Ia. 27. When the defendant files no plea no issue is joined, and the verdict of the jury is a nullity, and no judgment can be pronounced on it. *State v. Cunningham*, 94 N. C. 824. Refusal to plead on arraignment is no waiver, and entry of a plea on defendant's behalf will not aid an invalid complaint. *People v. Gregory*, 80 Mich. 371.

After he had pleaded, and stated in writing, that he had no objection to any of the jury, the trial proceeded. The judge's note of the evidence was handed to him, after the examination of each witness, and he was asked in writing if he had any question to put. The proof on the part of the prosecution being insufficient, he was acquitted without being called upon for his defence. *R. v. Thompson*, 2 Lew. C. C. 137. So the jury having found that the prisoner was mute by visitation of God, and then, being sworn to try whether he was of sound mind, found that he was, his counsel pleaded not guilty for him, and the trial proceeded in the usual manner and the evidence was not interpreted to the defendant. *R. v. Whitfield*, 3 C. & K. 121, *coram Williams, J.*

But where a prisoner is deaf and dumb, and cannot be made to comprehend the nature of the proceedings and the details of the evidence, the proper course is, after the jury have found him mute by the visitation of God, to reswear the jury to inquire whether he is able to plead to the indictment; and if that be found in the negative, then to swear them again, to inquire if the prisoner be sane or not, and if the jury find him to be insane, the judge will order him *to be confined under the 39 & 40 Geo. 3, c. 94, s. 2, *post*. [*199 "There are three points to be inquired into. 1st. Whether the prisoner is mute of malice or not. 2nd. Whether he can plead to the indictment or not. 3rd. Whether he is of sufficient intellect to comprehend the course of proceedings at the trial so as to make a proper defence." *R. v. Pritchard*, 7 C. & P. 303, 32 E. C. L.; *R. v. Dyson*, Id. 305 (n); *R. v. Berry*, L. R. 1 Q. B. D. 447; 45 L. J., M. C. 123.

If the prisoner stands mute of malice, or will not answer directly to the indictment, or information (for treason, felony, piracy, or misdemeanor), it is enacted by the 7 & 8 Geo. 4, c. 28, s. 2, that in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person, and the plea so entered shall have the same effect as if such person had actually pleaded the same.¹ And where the prisoner, who was indicted for murder, remained mute of malice, Erle, J., refused to assign counsel for his defence, as the prisoner's assent could not under the circumstances be given. *R. v. Yscuado*, 6 Cox, C. C. 386.

Where the prisoner refused to plead, on the ground that he had already pleaded to an indictment for the same offence, (which had been tried before a court not having jurisdiction), it was held that the court might order a plea of "not guilty" to be entered for him under the above statute. *R. v. Bitton*, 6 C. & P. 92, 25 E. C. L.

In cases of insanity it is enacted by the 39 & 40 Geo. 3, c. 94, s. 2, that if a person, indicted for any offence appears insane, the court may, on his arraignment, order a jury to be impannelled to try the sanity, and if they find him insane, may order the finding to be recorded, and the insane person to be kept in custody till his majesty's

¹ *United States v. Hare*, 3 Wheeler's C. C. 285. S.

pleasure be known. The question is whether the prisoner has sufficient understanding at the period of arraignment to understand the charge, and it is immaterial to show that at other times insanity has shown itself. *R. v. Keary*, 14 Cox, C. C. 143.¹

The latter section applies to misdemeanors as well as to felonies. *R. v. Little, Russ. & Ry.* 430.

When a jury is impannelled to try the sanity of a prisoner under this section, the counsel for the prosecution begins and calls his witnesses to prove the sanity of the prisoner. *Per Williams, J., R. v. Davies*, 3 C. & K. 328.

Where a party was indicted for a misdemeanor in uttering seditious words, and upon his arraignment refused to plead, and showed symptoms of insanity, and an inquest was forthwith taken under the above statute to try whether he was insane or not, it was held, 1st, that the jury might form their own judgment of the present state of the defendant's mind from his demeanor, while the inquest was being taken, and might thereupon find him to be insane without any evidence being given as to his present state; 2nd, that upon the prisoner showing strong symptoms of insanity in court during the taking of the inquest, it became unnecessary to ask whether he would cross-examine witnesses on the inquest, or would offer any remarks on evidence. *R. v. Goode*, 7 A. & E. 536, 34 E. C. L.

See further as to the mode of dealing with prisoners found to be insane, *post*, tit. "Insanity."

Postponing the trial. No traverse is allowed in case of felony, but where the courts deem it necessary for the purpose of justice, they *will postpone the trial until the next assizes or session. *200] And now misdemeanors are put on the same footing in this respect as felonies; the 14 & 15 Vict. c. 100, s. 27, enacting that "no person prosecuted shall be entitled to traverse or postpone the trial of *any* indictment found against him at any session of the peace, session of oyer and terminer, and general gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further term, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizances for that purpose."

Instances have occurred in which a principal witness has been of such tender years and so ignorant as not to understand the nature and obligation of an oath, that the judge has ordered the trial to be put off until the next assizes, and directed the child in the meantime to

¹ Insanity at the time of trial must be decided as an issue by the jury before they proceed to try the issue of guilt. *State v. Haywood*, 94 N. C. 847.

be instructed in religion. *Ante*, p. 116. Also where it appears by affidavit that a necessary witness for the prisoner is ill. *R. v. Hunter*, 3 C. & P. 591, 14 E. C. L., or that a witness for the prosecution is ill (see *ante*, p. 71), or unavoidably absent, or is kept out of the way by the contrivance or at the instigation of the prisoner, the court will postpone the trial, unless it appear that the requirements of justice can be satisfied by reading the witness's depositions before a magistrate.

If it is moved on the part of the prosecution in a case of felony, to put off the trial on the ground of absence of a material witness, the judge will require an affidavit stating the points which the witness is expected to prove, in order to form a judgment whether the witness is a material one or not. *R. v. Savage*, 1 C. & K. 75, 47 E. C. L.¹ An affidavit of a surgeon, that the witness is the mother of an unweaned child afflicted with an inflammation of the lungs, who could neither be brought to the assize town nor separated from the mother without danger to life, is a sufficient ground on which to found a motion to postpone the trial. *Id.* Where a prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes was absent, and that on cross-examination this witness could give material evidence for the prisoner, Cresswell, J., after consulting Patteson, J., held that this was a sufficient ground for postponing the trial, without showing that the prisoner had at all endeavored to procure the witness's attendance, as the prisoner might reasonably expect, from the witness having been bound over that he would appear. *R. v. Macarthy*, Carr. & M. 625, 41 E. C. L. In *R. v. Palmer*, 6 C. & P. 652, 25 E. C. L., the Judges of the Central Criminal Court postponed until next session the presentment of a bill for a capital offence to the grand jury, upon the affidavit of the attor-

¹ The court in its discretion will grant a continuance where witnesses are absent and the case of defence is not prepared, but the affidavit must clearly show that the witnesses are important and can be secured by delay, and that the facts they will testify to cannot be proved otherwise. *Dacey v. People*, 116 Ill. 555. Refusal to grant a continuance is no ground for a new trial. *Lamar v. State*, 63 Miss. 265. The reading of the testimony of an absent witness, by agreement, in order to avoid a postponement will not preclude the State from introducing the absent witness, if possible, before the conclusion of the evidence. *Hackett v. State*, 13 Tex. App. 406. An admission on the part of the State of the fact that shots were fired from a certain window, to avoid a continuance, does not necessarily preclude the State from showing that certain persons standing near heard no shots. While inadmissible to contradict the fact admitted, such evidence might be competent for other purposes. *Burchfield v. State*, 82 Ind. 580. When the testimony of an absent witness is read by agreement, it is error for the judge in his charge to draw any distinction between such testimony and that of the witnesses present. *State v. Underwood*, 75 Mo. 230. Nor is the admission of such testimony, under a statute authorizing it, a violation of the constitutional provision that accused shall have compulsory process for his witnesses. *Id.* An affidavit for a continuance for want of witnesses is insufficient which fails to show when attachments for them issued and to whom they were delivered. *Bowman v. State*, 40 Tex. 8. A continuance for absence of plaintiff, a material witness, was held to be properly refused when it appeared no diligence had been used to obtain his deposition. *Smith v. Cunningham*, 9 Phila. (Pa.) 96; *Campbell v. Blanke*, 13 Kan. 62; *State v. Lange*, 59 Mo. 418; *Guagando v. State*, 41 Tex. 626. No evidence will be heard to contradict an affidavit for a continuance. *Wick v. Weber*, 64 Ill. 167; *Quincy Whig Co. v. Tillson*, 67 Ill. 351. But the State may show that the witness is a fugitive from justice, and cannot be introduced. *People v. Cleveland*, 49 Cal. 577.

ney for the prosecution, that a witness whose evidence was sworn to be material, was too ill to attend, and they refused to refer to the deposition of the witness to ascertain whether he deposed to material facts. Where in a case of murder committed in Newcastle-upon-Tyne, which had created great excitement, a newspaper published in the town had spoken of the prisoner as the murderer, and several journals down to the time of the assizes had published paragraphs, *201] *implying or tending to show his guilt, and it appeared that the jurors at such assizes were chosen from within a circle of fifteen miles round Newcastle, where such papers were chiefly circulated, but that at the summer assizes they would be taken from the more distant parts of the county of Northumberland (into which the indictment had been removed) Alderson and Parke, BB., postponed the trial until the following assizes. Alderson, B., however, said, "I yield to the peculiar circumstances of the case, wishing it to be understood that I am by no means disposed to encourage a precedent of this sort." *R. v. Bolam*, Newcastle Spring Ass. 1839, MS.; 2 Moo. & R. 192. See also *R. v. Joliffe*, 4 T. R. 285. And in *R. v. Johnson*, 2 C. & K. 354, the same learned judge refused to postpone the trial of a prisoner charged with murder, on the ground that an opportunity might be thereby afforded of investigating the evidence and characters of certain witnesses who had not been examined before the committing magistrate, but who were to be called for the prosecution to prove previous attempts by the prisoner on the life of the deceased. A trial for murder was postponed till the next assizes by Channell, B., upon an affidavit of a medical man as to a witness being unable to travel, although such witness was not examined before the magistrate, and although the trial had been fixed for a particular day. *R. v. Lawrence*, 4 F. & F. 901.

In general a trial will not be postponed to the next assizes before a bill is found. *R. v. Heesom*, 14 Cox, C. C. 40. But where it was shown that the attendance of witnesses, inmates of a workhouse in which small-pox had broken out, was necessary, Bagallay, L. J., did not require any bill to be sent up before the grand jury but postponed the trial to the next assizes, admitting the prisoner to bail in the meantime. *R. v. Taylor*, 15 Cox, C. C. 8. No objection appears to have been taken on the part of the prisoner to the postponement.

In no instance will a trial be put off on account of the absence of witnesses to character. *R. v. Jones*, 8 East, 34.

Where the prisoner applies to postpone the trial, he will be remanded and detained in custody till the next assizes or sessions, or will be admitted to bail, but he is never required to pay the costs of the prosecutor. *R. v. Hunter*, 3 C. & P. 591, 14 E. C. L. Where the application is by the prosecutor, the court in its discretion will either detain the prisoner in custody, or admit him to bail, or discharge him on his own recognizances. *R. v. Beardmore*, 7 C. & P. 497, 32 E. C. L. *R. v. Parish*, Id. 782; *R. v. Osborne*, Id. 799; see also *R. v. Crowe*, 4 C. & P. 251, 19 E. C. L. A motion to put off a trial on an indictment for felony made on behalf of the prisoner, cannot be entertained until

after plea pleaded. *R. v. Bolam*, 2 Moo. & R. 192. Previous to the spring assizes A. was committed to take his trial for shooting B. The trial was postponed till the summer assizes, on the ground that B. (who shortly afterwards died) was too ill from his wounds to attend to give evidence. At the summer assizes a true bill was found against A. for the murder of B., and an application was made to put off the trial until the following spring assizes, on account of the illness of a material witness. Williams, J., granted the application, and held that A. was not entitled to his discharge under the seventh section of the Habeas Corpus Act. *R. v. Bowen*, 9 C. & P. 509, 38 E. C. L.; see *R. v. Chapman*, 8 C. & P. 558, 34 E. C. L.¹

The application should be made before the prisoner is given in charge to the jury, as it is very doubtful whether, if the adjournment *of the trial involved a discharge of the jury, it would be granted. See *post*, p. 222. It seems that, after the prisoner is given in charge, a judge has no authority to adjourn the trial till another day on account of the absence of witnesses. See *R. v. Parr*, 2 F. & F. 861.² As to cost upon postponement, see *post*, "Costs," p. 241.

Plea. There are several kinds of pleas in criminal cases, but the only ones that are at all likely to occur in ordinary practice are the three special pleas, *autrefois acquit*, *autrefois convict* and *pardon*, and the general issue of *not guilty*. As to refusal or inability to plead see *ante*, title "Arraignment," p. 198.

Special pleas. The mode in which the first two of these pleas are pleaded is regulated by the 14 & 15 Vict. c. 100, s. 28, which provides that in any plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment. They may be pleaded *ore tenus*.³ If the plea be found against the prisoner, he will then, if he have not already done so, be allowed *in favorem vitæ* to plead over to the felony. *R. v. Birchenough*, 7 C. & P. 575, 32 E. C. L. But in misdemeanors either plea must be pleaded alone, for the plea is a plea in *bar*, and the defendant cannot plead over. *R. v. Taylor*, 3 B. & C. 502, 10 E. C. L. 1 Chitt. Cr. Law, 451.⁴

¹ Where a motion to continue a case is made and overruled it is not error in the judge to refuse to hear another motion based on different grounds, known at the time of the previous motion, not then made or suggested. *Brinkley v. State*, 54 Ga. 371.

² It is too late to ask for a continuance after trial is begun. *People v. Beam*, 66 Cal. 394.

³ Where the second trial is in the same court, the pleas of *autrefois acquit*, etc., need not be specially pleaded. The court is bound to take cognizance of them. *Robinson v. State*, 21 Tex. App. 160.

⁴ The old distinction taken in this respect between felonies and misdemeanors is rejected in the United States. *United States v. Williams*, 1 Dillon, 485; *Barge v. Commonwealth*, 3 P. & Watts, 262; *Foster v. State*, 8 W. & S. 77; *Ross v. State*, 9 Mo. 687.

The onus of proving these pleas lies upon the defendant. By the 14 & 15 Vict. c. 99, s. 13, it is provided that it shall not be necessary to produce the record of the conviction or acquittal of any person or a copy thereof, but it shall be sufficient to produce a certified copy. See the section, *ante*, p. 165. If the record has not been made up, the court will postpone the case in order that it may be done; *R. v. Bowman*, 6 C. & P. 337; and the Court of Queen's Bench will, if necessary, grant a *mandamus* for that purpose; *R. v. JJ. of Middlesex*, 5 B. & Ad. 1113, 27 E. C. L. When the second indictment is preferred at the same assizes as the first, the original indictment and minutes of the verdict are receivable in evidence in support of the plea without a record being drawn up. *R. v. Parry*, 7 C. & P. 836, 32 E. C. L.

The jury have to try these pleas as a matter of fact. In *autrefois acquit* it is necessary to prove that the prisoner could have been convicted on the first indictment of the offence charged in the second.¹ This appears by the record, but, as was pointed out by Parke, B., in *R. v. Bird*, 2 Den. C. C. 94-98, something more is necessary; because, as the language of an indictment describing any offence is in general not material as to the date or place, or many other circumstances, the indictment would be equally descriptive of many offences of the same character, and an acquittal of the offence charged on one indictment, describing it in proper terms sufficient in point of law, would be an acquittal of every offence of the same sort, and against the same person. The learned baron then says, "This being clearly the rule, there would not be much difficulty in applying it to an ordinary charge of felony—larceny, for instance, of the goods of A. B., or an

¹ *Wilson v. State*, 24 Conn. 57; *Hassell v. Nutt*, 14 Tex. 260. When the verdict of a jury amounts to an acquittal from the offence specifically charged in the indictment it will bar another prosecution for the same offence. *Morman v. State*, 24 Miss. 54. The plea of *autrefois convict* is sufficient when the evidence necessary to support the second indictment would have sustained the first, and also whenever the proof shows the second case to be the same transaction with the first. *Roberts v. State*, 14 Ga. 8. Double pleading is not allowable in criminal cases. Therefore if a party pleads a former conviction, and also not guilty, the latter plea should be treated as a nullity. *State v. Copeland*, 2 Swan, 626; *Nauer v. Thomas*, 13 Allen, 572; *State v. Potter*, 1 Phil. (Law), 338. S.

Under a plea of *autrefois convict* the burden is upon the defendant to prove clearly that the offence now charged and that embraced in the former indictment are the same. *Cooper v. State*, 47 Ind. 61. The identity of the offence must be averred in the plea. *Pope v. State*, 63 Miss. 53. Conviction of forgery of a bond bars a trial for forgery of the mortgage it accompanies. *People v. Peck*, 4 N. Y. Crim. Rep. 148. A plea of "*autrefois acquit*" is not sustained by proof of an acquittal, under a former indictment, of acts of which the defendant could not be convicted under the second indictment. *McCoy v. State*, 46 Ark. 141. The offences must be the same both in law and fact and the former indictment and acquittal must have been sufficient in law. *State v. Williams*, 94 N. C. 891. Where a prisoner is indicted for murder and acquitted, or through some irregularity is discharged, he may be subsequently indicted for involuntary manslaughter, and a plea of former acquittal will not avail him. *Hilands v. Commonwealth*, 18 Weekly Notes of Cases (Pa.), 434; s. c. 1 Pa. Sup. Ct. Dig. 313; 1 County Ct. Rep. 532. But a verdict of murder in the second degree is an acquittal of murder in the first degree, and on new trial granted, the jury cannot find such a verdict. *Commonwealth v. Winters*, 1 County Ct. Rep. (Pa.) 537. *Contra*, *Bohanan v. State*, 6 Crim. Law Mag. 841; *State v. Belimer*, 20 Ohio St. 572; *United States v. Harding*, 1 Wall, Jr., (U. S.) 127.

ordinary charge of assault upon A. B. The prisoner charged on such an indictment would have to satisfy the court, first, that the former indictment, on which an acquittal took place, was sufficient in point of law, so that he was in jeopardy upon it; and secondly, that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To *prove the identity of the offence may not always be easy. If more or less evidence is gone into on the first trial the difficulty [*203 is little; if none is offered and the acquittal takes place, it is still an acquittal, entitling the prisoner to an exemption from any subsequent trial for the same offence. In such a case there is more difficulty in showing what the offence charged was, but it may be proved by the testimony of the witnesses who were subpoenaed to go, and did go, before the grand jury, by the proof of what they swore, or perhaps by a grand jurymen himself, or by the evidence of the prosecutor, or by proof how the case was opened by the counsel for him; in short, by any evidence which would show what crime was the subject of the inquiry, and would identify the charge, and limit and confine the generality of the indictment to a particular case.”¹

The difficulties pointed out by the learned baron have not been removed by decided cases; on the other hand, they have been increased by statutes which provide that on an indictment which charges one crime, the prisoner may be convicted of another crime of a similar nature, and other statutes which provide that a man may be convicted on an indictment which charges one crime though the facts show that the crime was somewhat different. Thus by the 14 & 15 Vict. c. 100, s. 9, on the trial of an indictment for felony or misdemeanor, the jury may find the person charged guilty of an attempt to commit the same; by the 24 & 25 Vict. c. 96, s. 41, on the trial of an indictment for robbery the jury may convict of an assault with intent to rob; by sect. 12, if upon the trial of any person for any misdemeanor it shall appear that the facts in evidence amount in law to a felony, such person shall not be entitled to be acquitted of the misdemeanor; by sect. 72, a person indicted for embezzlement may be convicted of larceny, and *vice versa*; by sect. 88, a person indicted for obtaining property by false pretences is not to be acquitted if the facts show that he was guilty of larceny; by sect. 94, on an indictment against several for jointly receiving, any one, or more, may be convicted for separately receiving. So by the 24 & 25 Vict. c. 94, accessories may be indicted as if they were principal felons. So by 24 & 25 Vict. c. 100, s. 60, a woman tried for the murder of her child may be found guilty of endeavoring to conceal its birth. In most of these cases it is provided, that the person who might have been convicted on the first indictment, shall not be liable to be tried again for the offence for which, though not indicted, he might have been convicted.

¹ *Faulk v. State*, 52 Ala. 415. On the trial of a plea of *autrefois acquit*, the witness may be asked whether the verdict of the jury on the former trial for arson related to the same house as on the second indictment. It is a matter of fact, not of opinion. *Page v. Commonwealth*, 27 Gratt. (Va.) 954.

The question as to when the prisoner is entitled to plead the plea of *autrefois convict* or *autrefois acquit* is frequently one of considerable difficulty. The prisoner must have received judgment of death, imprisonment, or the like if he be convicted, or if acquitted *quod eat sine die*. 2 Stark. Crim. Plead. 311. But a judgment reversed by a court of error is the same as no judgment, and in that case, therefore, the plea is not available. *R. v. Drury*, 3 C. & K. 193; 18 L. J., M. C. 189.¹ Until reversed, however, judgment upon an erroneous record is good. *Id.* In this case, Coleridge, J., gave an elaborate, considered judgment. And in *R. v. Charlesworth*, 31 L. J., M. C. 25, the court appears to take the same view.

A prisoner will not be considered to have been in jeopardy where the prosecution fails by reason of a defect in the indictment which might have been amended. *R. v. Green*, Dears & B. C. C. 113.

In *R. v. Walker*, 2 Moo. & R. 446, it was held that a prisoner who *204] had been convicted summarily of a common assault before two justices could plead *autrefois convict* to an indictment for feloniously stabbing under the repealed statute 9 Geo. 4, c. 31, the circumstances out of which the charge arose being the same in both cases. (As to summary proceedings for assaults being a bar to further proceedings, see *post*, "Assault.") On the other hand, in *R. v. Vandercomb*, 2 Leach, 708; 2 East, P. C. 59, it was held that a prisoner, indicted for burglary in breaking and entering a dwelling-house with intent to steal, cannot plead in bar an acquittal upon an indictment for burglary in the same dwelling-house on the same occasion, which charged a breaking and entering the same dwelling-house and stealing there. So a conviction for assault with imprisonment is no bar to an indictment for manslaughter. *R. v. Morris*, L. R. 1 C. C. R. 90; 36 L. J., M. C. 84. An acquittal upon an indictment for murder is a good plea to an indictment for manslaughter, but whether an acquittal or conviction for manslaughter is a bar to an indictment for murder does not appear to be certain. *Rex v. Holcroft*, 4 Co. 46 b.; 1 Russ. on Cr., 5th ed., p. 41; *R. v. Tancock*, 13 Cox, C. C. 217. In *R. v. Champneys*, 2 Moo. & R. 26, Patteson, J., held that an acquittal on an indictment against an insolvent debtor for omitting certain goods out of his schedule was no bar to a second indictment for the same offence in which the same goods and some others were specified; but the learned judge said that, except under very peculiar circumstances, such a course ought not to be pursued. The prisoners were indicted for larceny at common law, and for feloniously receiving the goods, the subject of the indictment, and were acquitted on the ground that the goods were fixtures in a building. On a second indictment for stealing the fixtures, it was held that they were not entitled to plead

¹ *People v. Barric*, 49 Cal. 342. A plea of former jeopardy is bad, where a new trial has been granted. *State v. Patterson*, 88 Mo. 88. A plea of former jeopardy must show that it has not been waived nor discharged by operation of law. *Hensley v. State*, 107 Ind. 587. A plea of former conviction is no bar where a new trial has been moved for. *State v. Miller*, 35 Kan. 328. A plea of *autrefois acquit* is not good, unless the judgment has not been reversed. *State v. Williams*, 94 N. C. 891. See *Commonwealth v. Winters*, 1 County Ct. Rep. (Pa.) 537.

autrefois acquit, as they had not been in peril on the count for receiving in the first indictment. *R. v. O'Brien*, 15 Cox, C. C. R. 29. So an acquittal upon an indictment under 24 & 25 Vict. c. 97, s. 35, and 24 & 25 Vict. c. 100, s. 32, charging the prisoner with the felony of obstructing a railway with intent to endanger the safety of passengers, etc., was held to be no bar to a subsequent indictment under ss. 36 and 34 of the same statutes respectively preferred on the same facts charging him with the misdemeanor of endangering the safety of passengers, etc., by an unlawful act. *R. v. Gilmore*, 15 Cox, C. C. 85. Formerly by the 7 Will. 4 & 1 Vict. c. 85, s. 11, on the trial of any person, for any felony whatever, where the crime charged included an assault against the person, it was lawful for the jury to acquit of the felony and to find a verdict of assault against the person indicted, but that section is repealed by the 14 & 15 Vict. c. 100, s. 10, so that now, on an indictment for the assault, the acquittal on the previous charge of felony could not be pleaded. Thus where a man had been acquitted of rape and also of an assault with intent to ravish, he was convicted of a common assault. *R. v. Dingley*, 4 F. & F. 99 (Willes). Where an offence is triable in more than one county an acquittal in one county would be a good bar to a second indictment in another county; but where the offence is triable in one county only, an acquittal in the wrong county would be no bar. 2 Hawk. P. C. c. 35, s. 3; 1 Russ. Cr. 5th ed., 50 note. An acquittal of murder before a court of competent jurisdiction, in a foreign country, is a good bar to an indictment for the same murder in this country. *R. v. Roche*, 1 Leach, 184; *R. v. Hutchinson*, 3 Keb. 785; 1 Russ. Cr., 5th ed., 51, note.¹

*A pardon must be specially pleaded, unless it be by statute; [*205 *R. v. Louis*, 2 Keb. 25; otherwise it is waived.

Formerly a pardon could only be pleaded under the great seal; *Bullock v. Dodds*, 2 B. & Ald. 258; but now by the 7 & 8 Geo. 4, c. 28, s. 13, where the sovereign by warrant under the sign manual, countersigned by one of the principal secretaries of state, grants a free or conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, has the effect of a pardon under the great seal. See *R. v. Harrod*, 2 C. & K. 294, 61 E. C. L.

A discharge or composition in bankruptcy under 46 & 47 Vict. c. 52, s. 167, does not exempt the debtor from criminal proceedings.

General issue. By the 7 & 8 Geo. 4, c. 28, s. 1, "If any person not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without any further form, be deemed to have

¹ Where *autrefois acquit* or *autrefois convict* and *not guilty* are pleaded together, the former must be tried first. Wharton Crim. Pleading and Practice, 8th ed., § 478, and cases cited. In strict practice, the two pleas cannot be concurrently pleaded, but if they are so pleaded, a verdict of guilty on the two is bad, and so of a verdict on one plea only. *Mountain v. State*, 40 Ala. 344; *Solliday v. Commonwealth*, 28 Pa. St. 13; *Nonemaker v. State*, 34 Ala. 211; see as to waiver, *Dominick v. State*, 40 Ala. 680; *People v. Fuqua*, 61 Cal. 377; *Davis v. State*, 42 Tex. 494.

put himself upon the country for trial, and the court shall in the usual manner order a jury for the trial of such person accordingly."¹

As has already been stated, *ante*, p. 199, if the person charged with the offence stand mute of malice, or will not answer directly to the indictment, a plea of *not guilty* will be entered for him.

Pleading over—demurrer. If the defendant demur in misdemeanor, the judgment is final; but, by the permission of the court, the defendant may plead over. *R. v. Birmingham & Gloucester Railway Co.*, 3 Q. B. 223, 43 E. C. L.; 9 C. & P. 469, 38 E. C. L. As to felonies the question has been much doubted, but in *R. v. Fadderaman*, 1 Den. C. C. 565; 19 L. J., M. C. 147, it was held by Alderson, B., Cresswell and Vaughan Williams, JJ., that on a *general* demurrer judgment for the crown was final, inasmuch as the prisoner thereby confesses all the material facts charged against him in the indictment. In cases of demurrer of a *special* nature, usually called demurrer in abatement, they thought it might be otherwise, and they intimated that the various *dicta* which appeared in the books, in opposition to the above ruling, were probably to be accounted for by this distinction not having been sufficiently attended to. See *R. v. Duffy*, 4 Cox, C. C. 24, and the cases collected in one Den. C. C. 293, *a*.

If the defendant plead a special plea in misdemeanor, the judgment is final. *Per Holt, C. J.*, *R. v. Goddard*, 2 Lord Raym. 920. But in treason and felony it is not so. *Id.* 2 Hale, P. C. 257. Whether in misdemeanor the defendant might plead over by leave of the court does not seem to have been decided;² see *R. v. Strahan*, *ubi supra*.

Joinder of distinct offences in the indictment—election. If two offences be charged in the same count of an indictment it is bad, but even before the passing of the 14 & 15 Vict. c. 100, there was no objection in point of law to inserting, in *separate* counts of the same indictment, several distinct felonies of the same degree and committed by the same offender; 2 Hale, 173; 1 Leach, 1103; and it is not a ground for arrest of judgment; *Id.* 1 Chit. C. L. 253; 3 T. R. 98; *R. v. Hinley*, 2 Moo. & R. 524; *O'Connell v. Reg.*, 11 C. & F. 155; *Reg. v. Heywood*, L. & C. 451; nor is it any ground for arrest of judgment *206] after a prisoner has been convicted of felony, that the indictment contains a count for a misdemeanor. *R. v. Ferguson*, 1 Dears.

¹ Where defendant pleads *not guilty*, the court has no power to direct a verdict of *guilty*. *Howell v. People*, 5 Hun, (N. Y.) 620.

² In indictments for misdemeanors, if a demurrer be overruled, judgment is against the defendant, otherwise in capital cases and felonies, where it is *respondent ouster*. *State v. Merrill*, 37 Me. 329. [In misdemeanor as well as felony, if a special plea in bar be determined against the defendant, in a matter of law, the judgment is *respondent ouster*. *Barge v. Commonwealth*, 3 P. & W. 262; *Foster v. Commonwealth*, 8 W. & S. 77.] On sustaining a demurrer to a plea in abatement, final judgment should not be rendered, but the defendant should be ordered to plead to the indictment, and upon his declining so to do, the plea of not guilty should be entered and the trial proceeded with. *Harding v. State*, 22 Ark. 210. S.

C. C. R. 427; 24 L. J., M. C. 61. In practice, where a prisoner was charged with several felonies in one indictment, and the party had pleaded, or the jury were charged, the court in its discretion would quash the indictment; or if not found out till after the jury were charged, would compel the prosecutor to elect on which charge he would proceed. *R. v. Young*, 3 T. R. 106; 2 East, P. C. 515; 2 Camp. 133; 3 Camp. 133; 2 M. & S. 539.¹ Now by the 24 & 25 Vict. c. 96, s. 5 (replacing the 14 & 15 Vict. c. 100, s. 16), it is enacted "That it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing not exceeding three which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them." And by s. 6, "if, upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings." The same act contains a similar provision as to embezzlement (s. 71). It would seem that the effect of this statute is to restrain the right of the judge to put the prosecutor to his election merely because the indictment contains three charges of larceny committed within six months, or because the property turns out upon the evidence to have been taken at different times. The act does not supersede the common law so as to compel the court to put the prosecutor to his election in other cases in which several felonies are charged in different counts, and in which the court does not in its discretion consider that the prisoner will be embarrassed in his defence. *R. v. Heywood*, L. & C. 451. It seems that where three acts of larceny are charged in separate counts there may also be three counts for receiving. *R. v. Heywood*, *supra*.

With respect to joining a count for stealing along with a count for receiving in the same indictment, the practice of doing so was condemned by the judges in *R. v. Galloway*, 1 Moo. C. C. 234. But now it is enacted by the 24 & 25 Vict. c. 96, s. 92 (replacing the 11 & 12 Vict. c. 46, s. 3), that "in any indictment containing a charge of feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof knowing the same to have been stolen," and *vice versa*; "and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to

¹ In an indictment for incest, the State must elect between the two counts which allege acts on different days. *State v. Lawrence*, 19 Neb. 307.

find a verdict of guilty, either of stealing the property, or of receiving the same or any part or parts thereof knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or receiving the same or any part or parts thereof knowing the same to have been stolen, or to find one or more of the *207] others of them guilty of receiving the same or any part or parts thereof knowing the same to have been stolen.”¹ By the Explosive Substances Act, 1883 (46 Vict. c. 3), s. 7, the same criminal act may be charged in different counts in the same indictment, and the prosecutor shall not be put to his election as to the count on which he must proceed.

With respect to offences not provided for by the above enactments:² where the prisoners were charged, in one count with robbing, and in a second with an assault with intent to rob, *Park, J.*, seemed to think that the two counts ought not to be joined in the same indictment, and called upon the prosecutor to elect on which he would go to the jury. *R. v. Gough*, 1 Moo. & R. 71. Where, however, the defendant was indicted under the 7 Will. 4 & 1 Vict. c. 85, ss. 2, 4, repealed 24 & 25 Vict. c. 95, in several counts for stabbing with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was held that the prosecutor was not bound to elect on which count he would proceed, notwithstanding the judgment is different, being in the first count capital, and in the other transportation. *R. v. Strange*, 8 C. & P. 172, 34 E. C. L. See also, *R. v. Jones*, 2 Moo. C. C. 94; 8 C. & P. 776, 34 E. C. L. Where an indictment for arson contained five counts, each of which charged the firing of a house of a different party, and it was opened that the five houses were in a row, and that one fire burnt them all; *Erskine, J.*, refused, upon this opening, to put the prosecutor to his election, as it was all one transaction. *R. v. Trueman*, 8 C. & P. 727, 34 E. C. L.; and see *R. v. Davis*, 3 F. & F. 19. And see *R. v. Brannon*, 14 Cox, C. C. 394; *ante*, p. 188.

Counts for distinct misdemeanors may be included in the same indictment, provided the judgment be the same for each offence. *R. v. Young*, 3 T. R. 98, 106; *R. v. Towle*, 2 Marsh. 466; *R. v. Johnson*, 3 M. & S. 539; *R. v. Jones*, 2 Campb. 132; *R. v. Castro*, 6 Ap. Ca. 229; 50 L. J., H. L. 497. Where, however, two defendants were indicted for a conspiracy, and also for a libel, and at the close of the case for the prosecution there was evidence against both as to the con-

¹ Election is not compulsory between a count for larceny and one for receiving stolen goods. *Andrews v. People*, 117 Ill. 195. But a conviction of robbery and also of receiving the stolen goods is bad, and where the evidence leaves it in doubt of which offence defendant was in fact guilty, the verdict must be set aside. *Tobin v. People*, 104 Ill. 565.

² A count for fornication and bastardy may be joined with a count for adultery. *Commonwealth v. Burk*, 2 C. C. Rep. (Pa.) 12; *Commonwealth v. Lehr*, 2 C. C. Rep. (Pa.) 341.

spiracy, but no evidence against one as to the libel; Coleridge, J., put the prosecutor to his election, on which charge he would proceed, before the counsel for the defendants entered upon their defence. *R. v. Murphy*, 8 C. & P. 297, 34 E. C. L. Where on an indictment for conspiracy one set of counts laid the offence with reference to a fire occurring upon the 7th of June, and another set with reference to a fire on the 25th of November, the counsel for the prosecution was made to elect between the two sets. *R. v. Barry*, 4 F. & F. 389. A prosecutor cannot maintain two indictments for misdemeanor for the same transaction, and he must elect to proceed with the one and abandon the other. *R. v. Britton*, 1 Moo. & R. 297.

The application by a prisoner to compel the prosecutor to elect is an application to the discretion of the court, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defence. *R. v. Trueman*, 8 C. & P. 727, 34 E. C. L.; *R. v. Hinley*, 2 Moo. & R. 524.¹ It is not usual to put the prosecutor to his election immediately upon the case being opened. *R. v. Wriggleworth*, cor. Alderson, J., *Hindmarch's Suppl. to Deacon's C. L.* 1583. And *semble*, that the reason for *putting a prosecutor to his election being that the prisoner may not have his attention divided between two charges, the [*208 election ought to be made, not merely before the case goes to the jury, as it is sometimes laid down, but before the prisoner is called on for his defence at the latest. *Id.*²

Quashing indictments. Where an indictment cannot be amended, and is so defective that, in case of conviction, no judgment could be

¹ Requiring election is in the sound discretion of the court, and may be deferred until the evidence is in on both sides. *People v. Ward*, 3 N. Y. Crim. Rep. 483. It is not compulsory unless pressed for by the defendant. *People v. Reavy*, 4 N. Y. Crim. Rep. 1.

² The prosecution on the trial of an indictment containing several counts, in which the same offence is charged in different forms, cannot be required to elect on which count it will proceed. *People v. Austin*, 1 Park. C. R. 154; *State v. Bell*, 27 Md. 675. [*Contra*, where the prosecution offers evidence of more than one offence. *Smith v. State*, 52 Ala. 384.] Compelling prosecution to elect on which count, is in the discretion of the court. *State v. Daubert*, 42 Mo. 242. Several distinct felonies of the same degree against the same offender may be embraced in the same indictment; but if objection is made on that account before plea, the court may quash the indictment, lest it should embarrass the defendant in his defence or prejudice him in his challenge to the jury, but the defendant has no legal right to have the indictment quashed, or to compel the State to elect as to the count on which it will proceed to try him, and it will not therefore be error if the court refuse to do it. *George v. State*, 39 Miss. 570; *State v. Nelson*, 14 Rich. (Law) 169; *Josephine v. State*, 39 Miss. 613. [But see *State v. Lawrence*, 19 Neb. 307.]

As to the misjoinder of counts on different offences in the same indictment: See *Oliver v. State*, 37 Ala. 134; *State v. Hood*, 51 Me. 363; *Cawley v. State*, Shep. Sel. Cas. 59, 37 Ala. 152; *People v. De la Guerra*, 31 Cal. 416; *Henwood v. Commonwealth*, 52 Pa. St. 424; *State v. Bartlett*, 53 Me. 446; *Womack v. State*, 7 Cold. 508; *Burgess v. State*, 44 Ala. 190; *McKinney v. State*, 25 Wis. 378; *United States v. Kazinski*, 2 Spr. 7; *Commonwealth v. O'Connell*, 12 Allen, 451; *State v. Gummer*, 22 Wis. 441; *Commonwealth v. Powell*, 8 Bush, 7; *Fisher v. State*, 33 Tex. 792; *State v. Brandon*, 7 Kan. 106; *United States v. Davenport*, Deady, 264; *State v. Lincoln*, 49 N. H. 464; *State v. Newton*, 42 Vt. 537; *State v. Merrill*, 44 N. H. 624; *State v. Wadsworth*, 30 Conn. 55. S.

given, the court would in general quash it on the application being made on the part of the prosecution. Indictments have been quashed because the facts stated in them did not amount to an offence punishable by law. *R. v. Burkett*, Andr. 230; *R. v. Sermon*, 1 Burr. 516, 543; *R. v. Philpott*, 1 C. & K. 112, 47 E. C. L.

Where the application is on the part of the defendant, the courts have almost uniformly refused to quash an indictment when it was preferred for some great crime, such as treason or felony; *Com. Dig. Indictment (H.)*; and see *R. v. Johnson*, 1 Wils. 325; forgery, perjury or subornation of perjury; *R. v. Belton*, 1 Salk. 372; 1 Sid. 54; 1 Vent. 370; *R. v. Thomas*, 3 D. & R. 621. They have also refused to quash indictments for cheating; *R. v. Orbell*, 1 Mod. 42; for selling flour by false weights; *R. v. Crooke*, 3 Burr. 1841; and for other minor offences. If the application is made on behalf of the defendant the court will not grant it, unless the defect is very clear and obvious, but will leave him to take objection in some other form. 1 Chitty, C. L. 299; see also *R. v. Heane*, 4 B. & S. 947, 116 E. C. L.¹

Where the prosecution is by the attorney-general, an application to quash the indictment is never made, because he may enter a *nolle prosequi*, which will have the same effect. *R. v. Stratton*, 1 Doug. 239, 240. See also *R. v. Burnby*, 5 Q. B. 348, 48 E. C. L.²

The application to quash must be made to the court in which the bill is found,³ except in cases of indictments at sessions, and in other inferior courts, in which cases the application is made to the Court of Queen's Bench, the record being previously removed there by *certiorari*. But it has been recently held that a court of quarter sessions has itself authority to quash an indictment found there before plea pleaded; and that the Court of Queen's Bench would not inquire on *certiorari* whether the indictment was properly quashed, but that the proper way of raising such a question was by writ of error. *R. v. Wilson*, 6 Q. B. 620, 51 E. C. L.

The application, if made on the part of the defendant, must, it should seem, be before plea pleaded. *Fost.* 231; *R. v. Rockwood*, 4 How. St. Tr. 684;⁴ but where the indictment had been found without jurisdiction, the court quashed it after plea pleaded. *R. v. Heane*, 4

¹ Where a *nolle prosequi* has been entered, and a new indictment preferred, parol evidence may be introduced by the State to show that the crime charged in the second indictment is the same as that charged in the first, to save the statute of limitations. *Swalley v. People*, 116 Ill. 247.

² But where the question of the sufficiency of a petition is raised for the first time by an objection to the evidence offered in support of it, the court will favor the petition, and will, where it is possible, hold the defects of the petition cured. *Barkley v. State*, 15 Kan. 99.

³ Objections to the indictment must be raised in the court below on a motion to quash, etc. *Jackson v. State*, 74 Ala. 26. A motion to quash is in the sound discretion of the court and is not subject to revision. *White v. State*, 74 Ala. 31.

⁴ Except by grace of court. In such cases the plea is withdrawn with privilege to renew. If the motion prevail the defendant has not been in jeopardy. *Mentor v. People*, 30 Mich. 91. A *nolle prosequi* cannot be entered during the trial without the consent of the defendant, nor can the State deprive him of the right to examine a witness by entering a *nolle prosequi* to the count upon which that witness has testified. *Commonwealth v. Scott*, 121 Mass. 33.

B. & S. 947, 116 E. C. L.; 33 L. J., M. C. 115; and see *R. v. Goldsmith*, L. R. 2 C. C. R. 74; 42 L. J., M. C. 94, *post*, "False Pretences." In one case (see *post*, "False Pretences"), Lush, J., quashed an indictment after the close of the case for the prosecution, because it did not contain the words "with intent to defraud." *R. v. James*, 12 Cox, 127.¹ Where the indictment had, upon the application of the defendant, been removed into the Court of King's Bench, by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment after a forfeiture of his recognizance, he not having carried the record down to trial. *Anon.*, 1 Salk. 380.

And now by the 14 & 15 Vict. c. 100, s. 25, "every objection to any indictment for any *formal* defect apparent on the face thereof *shall be taken by demurrer on motion to quash such indictment before the jury shall be sworn, and not afterwards; and [*209 every court before which any such objection shall be taken for any *formal* defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared."² It is no ground for an application to quash an indictment that another indictment has been prepared for the same alleged offence. *R. v. Stockley*, 3 Q. B. 238, 43 E. C. L.

But if the application be on the part of the prosecution, it seems it may be made at any time before the defendant has been actually tried upon the indictment. *R. v. Webb*, 3 Burr. 1468. Before an application of this kind on the part of the prosecution is granted, a new bill for the same offence must have been preferred against the defendant and found. *R. v. Wynn*, 2 East, 226. And when the court orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of such former indictment; *R. v. Webb*, 3 Burr. 1469; that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have done if it had not been quashed; *R. v. Glen*, 3 B. & Ald. 373, 5 E. C. L.; *R. v. Webb*, 3 Burr. 1468; 1 W. Bl. 460; and (particularly where there has been any vexatious delay on the part of the prosecution, 3 Burr. 1458) that the name of the prosecutor be disclosed. *R. v. Glen*, *supra*. A. was indicted for perjury at the spring assizes, 1843, and entered into recognizances to try at the summer assizes, 1844. It being discovered that the indictment was defective, another indictment was prepared and found at the latter assizes, on which the prosecutor wished the defendant to be tried. Wightman, J., held that the defendant was entitled to have the first indictment disposed of before he could be tried on the second, but quashed the first indictment upon the terms of the prosecutor paying the defendant his costs of the traverse and recognizances, and the defendant proceeded to trial on the second indictment without traversing. *R. v. Dunn*, 1 C. & K. 730, 47 E. C. L.

¹ See *Commonwealth v. Dennis*, 1 C. C. Rep. (Pa.) 278.

² *Commonwealth v. Frey*, 14 Wright, 245.

Amendment. The power of amendment in criminal cases was first conferred by the 9 Geo. 4, c. 15, but was confined to cases of misdemeanor, and the power was only conferred on courts of oyer and terminer and general gaol delivery. It was at first considered that the power ought to be very sparingly exercised; *R. v. Cooke*, 7 C. & P. 559, 32 E. C. L.; it being considered that one objection to an amendment was that the presentment on oath of the grand jury was thereby altered. *R. v. Hewins*, 9 C. & P. 786, 38 E. C. L.¹ But the legislature does not appear to have had any such scruples, for by the 11 & 12 Vict. c. 46, s. 4, the power of amendment was extended to cases of felony; and this enactment was again replaced by the more sweeping provision of the 14 & 15 Vict. c. 100, s. 1, by which, after reciting that "offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case, and that such technical strictness may safely be relaxed in many instances, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence, and that a failure of justice often takes place on the trial of persons charged *with felony and misdemeanor*, by reason of variances between
 *210] the statement in the indictment on which the trial is had and the proof of names, dates, matters and circumstances therein mentioned not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence," it is enacted that "whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname or other description whatsoever of any persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended,

¹ As to the power of amendment in criminal cases: See *Commonwealth v. Seymour*, 2 Brewst. 567; *State v. Daugherty*, 30 Tex. 360; *Commonwealth v. O'Brien*, 2 Brewst. 568; *State v. Lyon*, 47 N. H. 416; *Gregory v. State*, 46 Ala. 151; *Johnson v. State*, 45 Miss. 658; *State v. Runnals*, 49 N. H. 498; *Calvin v. State*, 25 Tex. 789. S.

Where an indictment charges a crime in the words of a statute, it is good. Omissions should be added by way of amendments. *Commonwealth v. Rosenberg*, 1 County Ct. Rep. (Pa.) 273.

according to the proof, by some officer of the court or other person, both in that part of the indictment wherein such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred."

In *R. v. Frost*, 1 Dears. C. C. R. 474; 24 L. J., M. C. 61, the prisoners were charged in an indictment with having by night in pursuit of game entered the lands of George William Frederick Charles Duke of Cambridge; on the trial a witness proved that George William were two of the duke's Christian names, and that he had others; no proof was given what they were. The prosecutor prayed an amendment of the indictment by striking out the names "Frederick Charles." This the court refused, and left the case to the jury, who, being satisfied as to the identity of the duke, convicted the prisoners. On a case reserved, the Court of Criminal Appeal quashed the conviction. Parke, B., said, "The court of quarter sessions have a power of amending given them by the statute 14 & 15 Vict. c. 100, s. 1, but they have a discretion, they are not bound to allow an amendment. Having omitted to amend at the trial, they cannot amend now. If they had asked us whether they ought to have done so, it is clear that upon the evidence before them they were perfectly right in refusing to make the amendment prayed for; but that they would have been equally wrong in refusing to amend, had the amendment asked for been to strike out all the Christian names of the Duke of Cambridge; who was described in the indictment as George William Frederick Charles Duke of Cambridge. According to the usual rule the prosecutor must [*211 prove all matters of description alleged, though it was not necessary to allege it. The proper course would have been for them to have found that the person mentioned was a person who had the title of Duke of Cambridge, and to have omitted all the Christian names." It has been held that an indictment for an attempt to murder A. W. may be amended by substituting for A. W. "a certain female child whose name is to the said jurors unknown," although the act refers only to variances in the name, or Christian or surname. *R. v. Welton*, 9 Cox, C. C. 297. An indictment charged D. T. as a receiver of stolen goods, "he, the said A. B., knowing them to have been stolen;" upon verdict of guilty he moved in arrest of judgment, but the court of quarter sessions struck out the words "A. B." and substituted "D. T." It was held by the Court of Criminal Appeal that the court had no power to amend after verdict, so as to alter the finding of the jury, and that the prisoner was entitled to move in arrest of judgment. *R. v. Larkin*, Dears. C. C. 365; 23 L. J., M. C. 125. See *Reg. v. Oliver*, 13 Cox, C. C. R. 538. On an indictment against the defendant for obstruct-

ing a footway leading from A. to G., it appeared that the so-called footway was for half a mile from its commencement, as described in the indictment, a carriage-way; the obstruction was in the part beyond. The Court of Queen's Bench held that this was a misdescription, which ought to be amended under the 14 & 15 Vict. c. 100, s. 1. *R. v. Sturge*, 3 E. & B. 734, 77 E. C. L.; 23 L. J., M. C. 172. On an indictment for stealing 19s. 6d. the court held that the indictment might be amended by altering the words "nineteen and sixpence" to "one sovereign." *R. v. Gumble*, L. R. 2 C. C. R. 1; 42 L. J., M. C. 7; and see *R. v. Bird*, 42 L. J., M. C. 44; 12 Cox, C. C. (C. C. R.) 257. Indictment for embezzlement laid the property in A. B. and others, to which was added by amendment the word "trustees of, etc." *R. v. Marks*, 10 Cox, C. C. 367. The tendency of the latter cases is to give the statute "a wide construction," see *Reg. v. Welton*, *supra*, *per* Byles, J.; 1 Russ. Cri. 57, 5th ed. Where an indictment charged the prisoner with supplying a noxious drug to procure the miscarriage of "a certain woman," Stephen, J., on objection, amended by altering the description to "a woman to the jurors unknown." *R. v. Titley*, 14 Cox, C. C. 502. But the same learned judge refused to allow an indictment charging the defendants with "endeavoring to persuade T. to supply a noxious drug" to be amended by supplying the name of any person to whom the drug was supplied, or for whom it was intended. *R. v. O'Callaghan*, 14 Cox, C. C. 499. It may, however, be mentioned that in the latter case the learned judge was influenced by the fact that there had been no preliminary inquiry before a magistrate, and that therefore there was the need for greater caution.

It probably was not intended by section 25 (*supra*, p. 208) to increase the power of amendment given by s. 1 (*supra*, p. 209), but merely to prevent formal defects apparent on the face of the indictment being taking advantage of after verdict, by motion in arrest of judgment or otherwise. The term "formal defect apparent on the face of the indictment" is rather indefinite; probably it would be held to mean such formal defects as may be amended by virtue of s. 1. See *R. v. Goldsmith*, L. R. 2 C. C. 74; 42 L. J., M. C. 94, *post*, "False Pretences."

As to the amendment of the record after judgment, see *Reg. v. *212 Gregory*, 4 D. & L. 777; *Gregory v. Reg.*, *infra*, p. 227; *Bowers v. Nixon*, 12 Q. B. 546, 64 E. C. L.

Jury de medietate linguæ. The 28 Edw. 3, c. 13, s. 2, which provides for the trial of aliens by a jury *de medietate linguæ*, was repealed as to England by the 26 & 27 Vict. c. 125; and the 6 Geo. 4, c. 50, s. 47, which contained further provisions as to such trials, is repealed by the 33 Vict. c. 14, which enacts that "from and after the passing of this act an alien shall not be entitled to be tried by a jury *de medietate linguæ*, but shall be triable in the same manner as if he were a natural-born subject."

As regards Ireland, the 28 Edw. 3, c. 13, s. 2, is repealed by the 3

& 4 Will. 4, c. 91, s. 50; and s. 37 of that act, which relates to this matter, is repealed by the 33 Vict. c. 14.

Challenges. Challenges are either to the *array* or to the *polls*; they are also either *peremptory* or *for cause*.

Time, and mode of taking them.¹ When one or more defendants have pleaded the general issue, they are informed by the officer of the court that the persons whose names he is about to call will form the jury which is to try them, and that they are at liberty to challenge any who may be called, as they come to be sworn. The practice as to the mode of getting a jury together is not very clearly defined, and probably differs considerably in different parts of the country. It is difficult to understand whether the rule laid down in *Vicars v. Langham*, Hob. 235, that there can be no challenge either to the array or to the polls until a full jury appear, is of perfectly general application. It is repeated, and no limits indicated, in *R. v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L.; 3 Burn, Just., ed. 30, p. 90; and *Joy on Confessions and Challenges*, s. 10. It is probably stated somewhat too broadly, and what is meant is, that before the prisoner is put to his challenges, he has a right to have the whole panel called over to see who does and who does not appear. *Fost. Cr. Ca.*, fol. ed. p. 7; *R. v. Frost*, 9 C. & P. 135, 38 E. C. L. However this may be, it is the constant practice in some counties to swear the first jurymen who answers as soon as he enters the box, without any further inquiry. In other places it is the practice to get a full jury into the box, and then to commence swearing them; then if any one is rejected, to call another is his place, and so on, *toties quoties*. If there is a defect of jurors, and either party pray a *tales*, he does not thereby lose his right to challenge; *Vicars v. Langham*, *supra*; Bull. N. P. 307; but Hawkins doubts whether a *tales* can be prayed by the prosecutor, upon an indictment or criminal information without a warrant from the attorney-general; *Hawk. P. C. c.* 41, s. 18. On the other hand, it is said by Blackstone, J., that "if by reason of challenges, or defaults of jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn;" 4 Bl. Comm. 355. See 14 Eliz. c. 9 (repealed 6 Geo. 4 c. 50, s. 62); *P. v. Dolby*, 2 B. & C. 104; *Arch. Cr. L.* 18th ed. p. 157. But, inasmuch as if the panel is exhausted, and no *tales* prayed, the court may, of its own accord, order the sheriff or other officer to return a fresh

¹ Where the panel was submitted again and again (before the State was required to pass upon it), until the defendant was satisfied or had exhausted his challenges, it was held not to be error. *State v. Ivey*, 41 Tex. 35. Failure on the part of either State or defendant to challenge at the proper time is a waiver of the privilege. *Kingen v. State*, 46 Ind. 132. The prisoner having accepted a juror cannot afterwards challenge him on the ground of newly discovered statements showing prejudice. *Werner v. State*, 44 Ark. 122; but one disqualified to serve as a juror, such as an alien, may be removed by the court. *People v. Barker*, 8 Crim. Law Mag. 61. The defendant may be required to cross-examine a juror on his qualification, before the State accepts or rejects the juror. *Hardin v. State*, 4 Tex. App. 355; *Ray v. State*, Id. 450.

panel *instantly* (1 Hale, P. C. 28, 260), the point is not of very great importance.

There is no doubt that the time for the prisoner to challenge the polls is, as each juryman comes to the book to be sworn; that is, after *213] *the juryman has been called for the purpose of being sworn, and before the oath has commenced. It seems that the formal delivery of the book into the hands of a juryman is the commencement of the oath. *R. v. Frost*, 9 C. & P. 126, 38 E. C. L.; *R. v. Brandreth*, 32 How. St. Tr. 770. See also *R. v. Giorgetti*, 4 F. & F. 546; but if the juryman, of his own accord, takes the book into his hands, his doing so not being directed by the court, or sanctioned by the court, that does not take away the right of challenge; *R. v. Frost, supra*. It is not absolutely necessary that the names should be called in the order in which they stand on the panel, but that order may be departed from if convenience requires it. *Mansell v. Reg., Dears. & B. C. C.* 375.

The challenge to the array must, of course, be before any juryman is sworn.

Where the indictment charged a subsequent felony in one count, and a previous conviction in another, and the prisoner, at the request of his counsel, was arraigned separately on the subsequent felony, and afterwards on the previous conviction, it was doubted if it was necessary to re-swear the jury, and give the prisoner his challenges. *R. v. Key*, 3 C. & K. 371. But an express provision for separate arraignment without re-swearing the jury is now made in most cases. See p. 225.

Challenges to the array. The learning on this subject has to be sought out of old books; and there is great difficulty in deriving from them any precise rules.¹ It is, however, quite clear that any partiality in the sheriff, under-sheriff, or other officer who is concerned in the return of the jury is a good cause of challenge to the array. And that this partiality will be assumed to exist, if the sheriff or other officer be of kindred or affinity to either party; or if any dispute be pending between the sheriff and either party which would be likely to influence the sheriff; or if the sheriff or other officer have been concerned for either party in the same matter, either as counsel, attorney, or the like. *Co. Litt.* 156 a; *Bac. Abr. tit. Juries (E)*.

There can be no challenge to the array on the ground of the partiality of the master of the crown office, in a case where he is the officer by whom the jury is to be nominated under a rule of court, according to the statute 3 Geo. 2, c. 25, s. 15 (repealed 6 Geo. 4, c. 50,

¹ As to what constitutes a sufficient ground of challenge to the array of jurors. *Bowman v. State*, 41 Tex. 417. There is no challenge to the array because the court has erroneously directed the coroner to serve a special venire. *People v. Welch*, 49 Cal. 174. The only ground for challenge to the array is that the officer who summoned the jurors was biased. *People v. Welch*, 49 Cal. 174. Challenge to the array is only for misconduct of sheriff or irregularity in the list. *State v. Speaks*, 94 N. C. 865. The fact that one of the forty-eight men drawn as petit jurors is an alien, is not fatal to the array. *Buchanan v. Commonwealth*, 1 Pa. Sup. Ct. Dig. (Pa.) 252.

s. 64); *R. v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. The only remedy in such a case is to apply to the court to appoint another officer to nominate the jury.

By the 6 Geo. 4, c. 50, s. 13, the want of four hundredors in the panel is declared to be no cause of challenge; and by s. 28, the same is declared with respect to the want of a knight.

Whether there is the same right in a subject as in the crown to challenge for favor has been doubted; see 2 Hawk. P. C. c. 44, s. 32. But that doubt is obsolete.

A challenge to the array should be in writing, so that it may be put upon the record, and the other party may plead or demur to it; and the cause of challenge must be stated specifically. *R. v. Hughes*, 1 C. & K. 235, 47 E. C. L.

When the opposite party pleads to the challenge, two triers are appointed by the court; either two coroners, two attorneys, or two of the jury, or indeed any two indifferent persons. If the array be quashed against the sheriff, a *venire facias* is then directed **instantly* to the coroner; if it be further quashed against the coroner, it is then awarded to two persons, called *elisors*, chosen [214 at the discretion of the court, and it cannot be afterwards quashed. Co. Litt. 158 a.

It has been said that there is some distinction between trying challenges; those that are manifest or principal challenges, as they are called being tried by the court without the appointment of any triers. See Co. Litt. 156 a; Bac. Abr., tit. Juries, E. 12; but triers would probably now be appointed in all cases.

The truth of the matter alleged as cause of challenge must be made out by witnesses to the satisfaction of the triers. The challenging party first addresses the triers, and calls his witnesses; then the opposite party addresses them, and calls witnesses if he thinks fit; in which case the challenger has a reply. The judge then sums up to the triers, who give their decision. See *R. v. Dolby*, 2 B. & C. 104, 9 E. C. L. If a challenge to the array be found against the party, he may afterwards, notwithstanding, challenge to the polls.

Challenges to the polls. Challenges to the polls are either peremptory or for cause. By the common law, the king or the prosecutor who represented him might challenge peremptorily any number of jurors; simply alleging *quod non boni sunt pro rege*; but by the 33 Edw. 1, st. 4, this right is taken away, and the king is bound to assign the cause of his challenge; and this enactment is repeated in the same words in the 6 Geo. 4, c. 50, s. 29.

A practice, however, which has continued uniformly from the time of Edw. 1 to the present, enables the prosecutor to exercise practically the right of peremptory challenge; because, when a man is called, the juror will, on his request, be ordered to stand by; and it is only when the panel has been exhausted, that is, when it appears that, if the jurors ordered to stand by are excluded, there will be a defect of jurors, that the prosecutor is compelled to show his cause of objection. *Mansell v.*

Reg., Dears. & B. C. C. 375.¹ When it appears that, in consequence of the peremptory challenges by the defendant, and the juryman ordered to stand by at the request of the prosecutor, a full jury cannot be obtained, then the proper course is to call over the whole panel again, only omitting those that have been peremptorily challenged by the defendant. *R. v. Geach*, 9 Car. & P. 499, 38 E. C. L. And even on the second reading over of the panel a juryman may be ordered to stand by at the request of the prosecutor, if it reasonably appears that sufficient jurymen may yet appear. *Mansell v. Reg.*, *supra*.

The prisoner has, in cases of felony, twenty peremptory challenges and no more; 6 Geo. 4, c. 50, s. 29; and the right exists whether the felony be capital or not. *Gray v. Reg.*, 11 Cl. & Fin. 427. The number in cases of high treason is thirty-five, but this is reduced to twenty in such cases of treason as are, by the 39 & 40 Geo. 3, c. 93, and the 5 & 6 Vict. c. 51, directed to be tried in the same manner as charges of murder; these are cases where the overt act alleged in the indictment is assassination of the king, or any attempt against his person, whether direct or by compassing and imagining only. In cases of misdemeanor there is no right of peremptory challenge; Co. Litt. 166. But the defendant is generally allowed to object to jurors as they are called, without showing any cause, till the panel is exhausted; and that practice was approved of by *215] **Williams, J.*, in *R. v. Blakeman*, 3 C. & K. 97. If the panel be thus exhausted, the list must be gone through again, and then no challenge allowed except for cause.²

If a juror be challenged for cause before any juror sworn, two triers are appointed by the court; and if he be found indifferent and sworn, he and the two triers shall try the next challenge; and if he be tried and found indifferent, then the first triers shall be discharged, and the two first

¹ *Haines v. Commonwealth*, 12 W. N. Cases (Pa.) 193; *Smith v. Commonwealth*, Id. 196. Where the defendant declines to make any challenge the prosecution may interpose a peremptory challenge. *People v. McCarty*, 48 Cal. 557.

² Jurors may be peremptorily challenged at any time before they are sworn. *People v. Jenks*, 24 Cal. 11; *Morton v. State*, 1 Kan. 468. [But where a juror has once been sworn as competent, a peremptory challenge is barred. *People v. Carpenter*, 4 N. Y. Crim. Rep. 39.]

If the court improperly overrule the prisoner's challenge of a juror for cause, and the prisoner afterwards challenges him peremptorily, and does not exercise his right to challenge peremptorily to the full number allowed him by law, the judgment will not be reversed. *Mimms v. State*, 16 O. St. 221; *State v. Cockman*, 1 Winst. 95. [The judgment of the court on a challenge for actual bias, will not be reviewed except on exception to the ruling in accepting or rejecting evidence. *People v. Cotta*, 49 Cal. 166; *People v. Vasquez*, 49 Cal. 560; *People v. Colson*, 49 Cal. 679. A challenge to a juror for implied bias must specify the grounds of the challenge. *People v. Buckley*, 49 Cal. 241. The bias of a juror is a question for the court. *People v. Otto*, 4 N. Y. Crim. Rep. 149.]

In felony defendant cannot waive his right to be tried by a jury of twelve. *State v. Mansfield*, 41 Mo. 470; *Hill v. People*, 16 Mich. 35. S.

Where a "struck jury" is impanelled under the Ohio statute, after twelve jurors have entered the box unchallenged for cause, the party demanding the struck jury loses the right of peremptory challenge. *State v. Moore*, 28 O. St. 595. The officer selected to choose such a jury is not disqualified by having expressed an opinion upon the cause of trial. *Webb v. State*, 29 O. St. 351.

jurors tried and found indifferent shall try the rest; Co. Litt. 158; 2 Hale, P. C. 275; Bac. Abr., tit. Juries, E. 12.

The trial proceeds in the same manner as a challenge to the array. The juror challenged may be himself examined as to any cause of unfitness. Bac. Abr., *ubi supra*.

A juror may be challenged on the ground that he is not *liber et legalis homo*; and this would hold good against outlaws, aliens, minors, villeins, and females. He may also be challenged on the ground of infamy; which ground is said not to be removed by pardon; Bac. Abr., tit. Juries, E. 2; or that he is not fit to serve from age, but see *Mulcahy v. Reg.*, L. R. 3 H. of L. 306; or some other personal defect; or that he is not qualified. The qualification of jurors is fixed by the 6 Geo. 4, c. 50, s. 1, which provides, that "all persons between the ages of twenty-one and sixty years, residing in any county in England, who shall have in his own name or in trust for him, within the same county, ten pounds by the year above reprises, in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or of rents issuing out of any such lands or tenements, or in any such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person; or who shall have within the same county twenty pounds by the year above reprises in lands or tenements, held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, or who, being a householder, shall be rated or assessed to the poor-rate, or to the inhabited house duty in the county of Middlesex, on a value of not less than thirty pounds, or in any other county on a value of not less than twenty pounds, or who shall occupy a house containing not less than fifteen windows, shall be qualified to serve on juries on all issues in all the superior courts, both civil and criminal, and in all courts of assizes, nisi prius, oyer and terminer, and gaol delivery, and in all issues joined in courts of sessions of the peace, such issues being respectively in the county in which every man so qualified respectively shall reside." And every man, being between the aforesaid ages, "residing in any county in Wales, and being there qualified to the extent of three-fifths of any of the foregoing qualifications," shall be qualified to serve on juries in all issues joined in the courts of great sessions, and in courts of sessions of the peace, in every county in Wales in which every man so qualified shall reside. By the 45 & 46 Vict. c. 50, s. 186, every burgess of a borough having a separate court of quarter sessions is qualified and liable to serve on juries in that court unless exempted by law, but by the Schedule of 33 & 34 Vict. c. 77, they are exempt from serving on county sessions. By 33 & 34 Vict. c. 77, schedule, members of the council, justices of the peace, the town clerk, and treasurer within the borough, are disqualified from serving on any jury in the county where the borough is situate. Justices are also *exempt from serving on any sessions for the jurisdiction of [*216 which they are justices.

A juror may also be challenged on the ground that he is not indifferent. The same circumstances which would support a challenge to the array for unindifferency in the sheriff would support a challenge to the poll for the same defect in a jurymen. It is no cause of challenge of a juror by the prosecutor that the juror is a client of the prisoner, who is an attorney; *R. v. Geach*, 9 C. & P. 499, 38 E. C. L.; nor that the juror has visited the prisoner as a friend since he has been in custody; *Id.* It is not allowable to ask a jurymen if he has not, previously to the trial expressed himself hostilely to the prisoner, in order to found a challenge, but such expressions must be proved by some other evidence; *R. v. Edmunds*, 4 B. & Ald. 471, 6 E. C. L.; *R. v. Cooke*, 13 How. St. Tr. 333. And they must amount to something more than an expression of opinion in order to constitute a good cause of challenge; they must lead directly to the conclusion that the jurymen is not likely to act impartially after he has heard the evidence.¹ Joy on Confessions and Challenges, p. 189. On the trial of an indictment for a riot, it is ground for challenge by the prosecution that the juror challenged is an inhabitant of the town where the riot took place, and that he took an active part in the matter which led to it; *per Coleridge, J., R. v. Swain*, 2 Moo. & R. 112.

After the prisoner has challenged twenty jurors peremptorily, he

¹ As to the incompetency of jurors from having formed an opinion. See *State v. Howard*, 17 N. H. 171; *Commonwealth v. Thrasher*, 11 Gray, 57; *People v. Symonds*, 22 Cal. 348; *Lowenbeg v. People*, 27 New York, 336; *Roy v. State*, 2 Kan. 405; *State v. Cockman*, 1 Winst. 95; *O'Connor v. State*, 9 Fla. 215; *Fahnestock v. State*, 23 Ind. 231; *People v. King*, 27 Cal. 507; *State v. Leicht*, 17 Ia. 28; *People v. Woods*, 29 Cal. 635; *Holt v. People*, 13 Mich. 224. [*City of Emporia v. Volmer*, 12 Kan. 622. The opinion must be a fixed one, unlikely to be changed by the evidence. *Black v. State*, 42 Tex. 377; *O'Mara v. Commonwealth*, 75 Pa. St. 424; *Ortwein v. Commonwealth*, 76 Id. 414; *People v. Brown*, 48 Cal. 253; *Reynolds v. United States*, 98 U. S. (8 Otto) 145; *Phelps v. People*, 72 N. Y. 334; but see *Greenfield v. People*, 74 N. Y. 277; *Grisson v. State*, 4 Tex. App. 374. A jurymen is not competent who has formed an opinion, which it would take conclusive evidence to change. *Andrews v. State*, 21 Fla. 598. But he is not disqualified unless his opinion is fully formed. *Pierson v. State*, 21 Tex. App. 14; *People v. Barker*, 8 Crim. Law Mag. 61. The opinion must be as to some existing fact, not as to some supposed defence. *People v. Carpenter*, 4 N. Y. Crim. Rep. 39. See *People v. Carpenter*, *Id.* 177. An opinion formed by a juror as to the guilt of a principal is not a disqualification on the trial of one as an aider and abettor. *Weston v. Commonwealth*, 17 Weekly Notes (Pa.), 77; s. c. 1 Pa. Sup. Ct. Dig. (Pa.) 335. An act forbidding disqualification for any opinion formed is unconstitutional. *Easton v. State*, 6 Baxter, (Tenn.), 466.] A juror having conscientious scruples against finding a party guilty of an offence punishable with death, may be challenged for principal cause by the people. *Walter v. People*, 32 N. Y. 147; *Fahnestock v. State*, 23 Ind. 231. S. Or because opposed to capital punishment on circumstantial evidence. *Jackson v. State*, 74 Ala. 28.

It is no disqualification to a juror that he was sworn in a prior trial, where a *nolle prosequi* has been taken and a new bill found. *Reid v. State*, 30 Ga. 556. Or that he has made improper remarks, for the express purpose of avoiding jury duty. *Moughon v. State*, 59 Ga. 308. Or that he has an opinion if it will readily yield to evidence. *Andrews v. State*, 21 Fla. 598; *State v. Meyer*, 58 Vt. 457; *People v. Crowley*, 4 N. Y. Crim. Rep. 26; see *People v. Buddensieck*, *Id.* 230; *People v. Clark*, *Id.* 572. But where the opinion has been formed by reading the evidence of a former trial, the juror is incompetent. *Staup v. Commonwealth*, 74 Pa. St. 458. Otherwise where he has formed his opinion on reading the evidence taken before the coroner. *Ortwein v. Commonwealth*, 76 Id. 414; *Allison v. Commonwealth*, 99 Id. 17. Or by reading the newspapers. *Coffy v. Commonwealth*, 1 Pa. Sup. Ct. Dig. (Pa.) 39. See *Anarchist's case*, 12 N. C. Rep. 865; s. c. 6 Am. Crim. Rep. 570.

may still challenge others for cause; *R. v. Geach*, 9 Car. & P. 499, 38 E. C. L.

As in a challenge to the array, the ground of challenge should be specifically stated in writing, in order that it may be placed on the record with the judgment thereon. *R. v. Hughes*, 1 C. & K. 235, 47 E. C. L.

Challenges improperly allowed or disallowed. It is said that if a challenge be overruled without demurrer, the ruling may be made the subject of a bill of exceptions; *R. v. City of Worcester*, Skin. 101; but see *post*. p. 234. If there is a demurrer and judgment thereon, there would be matter of error on the record, see *R. v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. If a challenge be improperly allowed, it is doubtful whether there is any matter for error; see *Mansell v. Reg.*, Dears. & B. C. C. 375.

Persons unfit to serve not challenged. A juror who is not qualified may object to serve though not challenged; and, if upon examination on oath he be found not to be so, he will be ordered to retire; 4 Harg. St. Tr. 740. A juryman on being called to serve on a trial for murder, stated that he had conscientious scruples to capital punishment. Upon this the judge ordered him to withdraw, although the counsel for the prisoner demanded that he should serve; the Court of Queen's Bench, on a writ of error, without stating whether they considered that this was the right course, said that they wished it to be understood that they by no means acquiesced in the doctrine contended for on the authority of an anonymous case in *Brownlow & Gold*. Rep. 41, that a judge, on the trial of a criminal case, has no authority, if there be no challenge on either side, to excuse a juryman on the panel when he is called, or to order him to withdraw, if he be palpably unfit, by physical or mental infirmity, to do his duty in the jury-box. *Mansell v. Reg.*, *ubi supra*.¹

Miscalling a juror. On a trial for murder the panel returned by the sheriff contained the names of J. H. T. and W. T. The name of *J. H. T. was called from the panel as one of the jury, and J. H. T., as was supposed, went into the box, and was duly sworn [*217 by the name of J. H. T. The prisoner was convicted. The following day it was discovered that W. T. had by mistake answered to the name of J. H. T., and that W. T. was really the person who had served on the jury. It was held in the Court of Criminal Appeal, by Lord Campbell, C. J., Cockburn, C. J., Coleridge, J., Martin and Watson, BB. (five), that there had been a mis-trial; by Erle, Crompton, Crowder, Willes, and Byles, JJ., and Channell, B. (six), that there had been no mis-trial. It was doubted in this case whether the objection was matter of error; and Pollock, C. B., Erle, Williams,

¹ It may sometimes be a ground for excusing a juror, that he is a brother of a witness for the State. *State v. Christian*, 30 La. Ann. 367. One disqualified to serve as a juror, such as an alien, may be removed by the court. *People v. Barker*, 8 Crim. Law Mag. 61.

Crompton, Crowder, and Willes, JJ., and Channell, B., thought that this was not a question of law arising at the trial over which the Court of Criminal Appeal had jurisdiction. *R. v. Mellor, Dears. & B. C. C. 468*, and see *R. v. Martin*, L. R. 1 C. C. R. 378; 41 L. J., M. C. 113.

Giving the prisoner in charge. When the jury have been brought together and sworn¹ the usual proclamation is made, and then the prisoner or prisoners, intended to be tried, are given in charge to the jury as their turn comes. It is not necessary that after a jury has been once got together, and the prisoner had his challenges, that that jury should try him if he be not given in charge; a fresh jury may be got together for the purpose, each of the prisoners, of course, having the same right of challenge as before. As the prisoner is not to be arraigned upon a previous conviction charged in the indictment until a verdict has been given for the subsequent offence, so also he cannot be given in charge upon the count charging the previous conviction until he is arraigned upon it. See *post*, p. 217.

2. THE HEARING.

Opening the case—conversations and confessions. Where there is counsel for a prisoner² in a case of felony, the counsel for the prosecution ought always to open the case. *R. v. Gascoine*, 7 C. & P. 772, 32 E. C. L. But sometimes he does not open it if the prisoner has no counsel, *R. v. Jackson*, Id. 773, unless there is some peculiarity in the circumstances. *Per Parke, B., R. v. Bowler*, Id. Where there is no counsel for the prosecution there can be no opening, as the prose-

¹ The rule is in criminal cases that the statutory form of oath must be administered—*Harriman v. State*, 2 Greene, (Ia.) 270; *Bivens v. State*, 6 Eng. 455; *Jones v. State*, 5 Ala. 666; *Johnson v. State*, 47 Ala. 62. That the petit jury is not properly sworn will work a reversal of judgment. *Peterson v. State*, 74 Ala. 34. But where the record states that the grand jury was sworn as the statute prescribes, it is sufficient. *Brown v. State*, 74 Ala. 478. The authority of the officer to administer oaths need not be shown. *People v. Bragle*, 26 Hun, (N. Y.) 378. The record must show that the jury was sworn in criminal cases. The recitation of an oath different from that prescribed is fatal, and is ground for reversal, although the record may also state that the jury were duly sworn. *Bray v. State*, 41 Tex. 560. As to the form of oath, see *State v. Owen*, 72 N. C. 605. It is not necessary that the form of oath should appear on the record. *Lawrence v. Commonwealth*, 30 Grat. (Va.) 845. This rule is not applicable to civil cases. It is too late after verdict and judgment to object to the form of oath administered in a civil suit. *Clements v. Crawford*, 42 Tex. 601. The jury in a criminal case must consist of twelve men. The defendant's consent to be tried by a less number is unavailing. *People v. O'Neil*, 48 Cal. 257. Trial by jury can be waived by consent only. *Benbow v. Robbins*, 72 N. C. 422; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

² The defendant's right to be represented by counsel continues through the whole trial. Where his presence is impracticable there should be a temporary postponement. *Martin v. State*, 51 Ga. 567; *Taylor v. State*, 42 Tex. 504. The prisoner's right to be present, only is in force where a substantive step is to be taken, it is not ground for error that he was absent while the jury's names were being placed in the box. *Bearden v. State*, 44 Ark. 331. If a view by the jury be granted, the prisoner may waive his right to be present, and if no objection appears will be held to have done so. *State v. Congdon*, 14 R. I. 458. Voluntary absence of the defendant is a waiver of his right to be present. *People v. Bragle*, 26 Hun, (N. Y.) 378.

cutor himself is never allowed personally to address the jury. *R. v. Brice*, 2 B. & Ald. 606. Where the counsel for the prosecution was proceeding to state the details of a conversation which one of the witnesses had had with the prisoner, upon an objection being taken, the court said that in strictness he had a right to pursue that course; *R. v. Deering*, 5 C. & P. 165, 24 E. C. L.; *R. v. Hartel*, 7 C. & P. 773, 32 E. C. L.; and the same rule was laid down in *R. v. Swatkin*, 4 C. & P. 548, 19 E. C. L.; but the judges in that case stated, that the correct practice was only to state the general effect of the conversation. 5 C. & P. 166 (n), 24 E. C. L. In a later case, however, Parke, B., after consulting Alderson, B., ruled that, with regard to conversations, the fair course to the prisoner was to state what it was intended to prove. *R. v. Orrell*, MS., Lanc. Spr. Ass. 1835; 1 Moo. & R. 467; *R. v. Hartel*, 7 C. & P. 773, 32 E. C. L.; *R. v. Davis*, Id. 785; but as a general rule this would appear upon the depositions. Parke, B., seems to have thought that the rule was different with respect to confessions, and that they ought not to be opened, as they may turn out to have been made under circumstances rendering them inadmissible [*218 in evidence. See *R. v. Davis*, *supra*.¹

Summing up. It is now provided by the 28 Vict. c. 18, s. 2, "If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendant's; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by

¹ The jury in a criminal case must not consider any admissions by the defendant's counsel as evidence against him. *Clayton v. State*, 4 Tex. App. 515. That counsel mistakes testimony is not ground for a new trial; otherwise if he appeals to any popular prejudice against the defendant. *Ferguson v. State*, 49 Ind. 33. Argument of counsel to be unauthorized and ground for reversal, must be on facts not in testimony, not on inferences from the testimony. *Hobbs v. State*, 74 Ala. 39; *People v. Barnhart*, 59 Cal. 402. Under the Texan Criminal Code, it is error to exclude material evidence, offered after counsel has closed his testimony, even though it might have been introduced at an earlier stage. *Donahoe v. State*, 12 Tex. App. 297; *Bostick v. State*, 11 Tex. App. 126; *Cohea v. State*, Id. 153. *Contra*, *Thompson v. State*, 37 Tex. 121, where the argument of the case was closed. It is the duty of the judge where a witness is recalled at the request of the jury after their retirement, to caution him to confine his statements to what he has said on his first examination. A failure to do so, where the witness makes additional statements, is ground for reversal. *Tarver v. State*, 43 Tex. 564. But generally the order of the testimony is in the discretion of the court. *Wilke v. People*, 53 N. Y. 525; *State v. Haynes*, 71 N. C. 79; *State v. Harrington*, 9 Nev. 91. The court may permit the State to examine a witness after defendant has concluded his testimony. *State v. Flynn*, 42 Ia. 164. And even prior to the conclusion of the argument. *Thomas v. State*, 1 Tex. App. 289. The rule forbidding more than one counsel on either side to examine witnesses cannot preclude separate counsel of two defendants. *State v. Bryant*, 55 Mo. 75.

counsel or not, each and every such prisoner or defendant or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present." See p. 220.

It is the usual course for counsel to sum up and not to reply where the only witnesses for the defence are witnesses to character. See *R. v. Dowse*, 4 F. & F. 492.

Defence. The counsel for the defendant cross-examines the witnesses for the prosecution. As to the mode of conducting the cross-examination, see *supra*, p. 142. When they have all been called, the presiding judge inquires if there are any witnesses for the defence; if there are none, the counsel for the prosecution may in his discretion address the jury in summing up, after which the counsel for the defence addresses the jury. If there are any witnesses for the defence, the counsel for the defence opens his case, and having called his witnesses sums up, and then the counsel for the prosecution replies, see *supra*, and see also *infra*, "Right to Reply." Where there are several defendants, and they are separately defended,¹ the order in which the counsel for the defence are to address the jury is not very clearly settled. In *R. v. Barber*, 1 C. & K. 434, 47 E. C. L., Gurney, B. (Williams and Maule, JJ., being present), said, that the rule was this: that, if counsel cannot agree among themselves as to the course to be adopted, it is for the court to call upon them in the order in which the prisoners are named in the indictment. In *R. v. Esdaile*, 1 F. & F. 213, which was an indictment for a conspiracy to defraud, Lord Campbell, C. J., called upon the counsel for the defendants in the order of their seniority. In *R. v. Belton*, 5 Jur., N. S. 276, Martin, B., said that, where one prisoner was defended by counsel and another not, he made it an invariable rule to hear the counsel for the defended prisoner first. In *R. v. Harris*, 3 Jur., N. S. 272, Channell, B., in a similar case, decided upon following the order in the indictment; but in *R. v. Holman*, Id. 722, Pollock, C. B., said, he did not subscribe to that imaginary rule of following the order in the indictment, and called upon the *219] *counsel before the undefended prisoner. In *R. v. Meadows*, 2 Jur., N. S. 718, Erle, J., said, "In a case before Lord Tenterden, in which I was counsel, it was held that the priority of defence should be determined by the priority of the names of the prisoners in the indictment, and I have ever since understood that to be

¹ Where two persons have been jointly indicted for a misdemeanor they cannot claim the right to be tried separately. *Commonwealth v. Lewis*, 25 Gratt. (Va.) 933. Severance is for the court, and cannot be assigned as error. *State v. Gooch*, 94 N. C. 987.

the rule. Attention must, however, be paid to the precise offence with which each prisoner is charged; for instance, the principal should make his defence before the accessory, and the thief before the receiver, and such like; but when the indictment is drawn by a knowing man, he usually puts the principal person first." When the counsel for one prisoner has witnesses to facts to examine, the counsel for another cannot be allowed to postpone his address to the jury until after those witnesses have been examined. *R. v. Barber*, 1 C. & K. 434, 47 E. C. L.; but this is probably a matter for the discretion of the judge in the particular case.¹

A prisoner's counsel, in addressing the jury, will not be allowed to state anything which he is not in a situation to prove, or which is not already in proof. *Per Coleridge, J., R. v. Beard*, 8 C. & P. 142, 34 E. C. L. And after his counsel has addressed the jury, the prisoner will not be permitted to make any statement to them. *R. v. Boucher*, Id. 141. The rule must be taken to be as here stated, although, as will be presently shown, some difference of opinion has been expressed lately by some of the judges. But where a prisoner had in the absence of his counsel pleaded to an indictment, *Patteson, J.*, on the application of the counsel, allowed the prisoner to demur before the evidence was gone into. *R. v. Purchase*, C. & M. 617. Where, in a case of shooting with intent to do grievous bodily harm, there was no one present at the committing of the offence but the prosecutor and the prisoner, *Alderson, B.*, allowed the latter, under these peculiar circumstances, to make his own statement before his counsel addressed the jury. *R. v. Malings*, 8 C. & P. 242, 34 E. C. L. And the same course was permitted by *Gurney, B.*, in another case, but with an observation that it ought not to be drawn into a precedent. *R. v. Walkling*, Id. 243. "The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed." *Per Patteson, J., R. v. Ryder*, 8 C. & P. 539, 34 E. C. L. See also *R. v. Dyer*, 1 Cox, C. C. 113. In *R. v. Taylor*, 1 F. & F. 535, *Byles, J.*, refused to permit it, but allowed the prisoner to exercise the option of either speaking for himself or of having his counsel to speak for him. The importance of this point arises from the anxiety which frequently exists on the part of the defence to lay the prisoner's statement before the jury, which the prosecutor cannot be compelled to do. In *R. v. Beard*, *supra*, *Coleridge, J.*, said that counsel could not be allowed to relate the prisoner's story, unless he were in a position to prove its truth; on the other hand, *Crowder, J.*, told the counsel for the prisoner that, what the prisoner said before the magistrate, he might now repeat through his counsel; *R. v. Haines*, 1 F. & F. 86. Perhaps the better course is for the court, which it has power to do, to have the statement read to the jury.

¹ It is within the court's discretion to limit an argument for the defence as to time. *Weaver v. State*, 24 Ohio St. 584; *State v. Collins*, 70 N. C. 241; *Lee v. State*, 51 Miss. 566; *State v. Linney*, 52 Mo. 40; *State v. Riddle*, 20 Kan. 711. But see *Hunt v. State*, 49 Ga. 255; *People v. Keenan*, 13 Cal. 581; *Dille v. State*, 34 O. St. 617; *Williams v. State*, 60 Ga. 367. As denying right altogether. *State v. Miller*, 75 N. C. 73.

On a trial for murder, on the counsel for the prisoner expressing to the jury his regret that he could not tell them the prisoner's account of how the death of the deceased was caused, Cockburn, C. J., allowed him to do so. *Reg. v. Weston*, 14 Cox, C. C. 346. But it appears that the following course is now approved by the judges of *220] the High Court, namely, that a prisoner defended by counsel may at the conclusion of his counsel's speech make his statement to the jury, with this proviso, that what he states from the dock is subject to the right of reply on the part of the prosecution, as being in the nature of new matter laid before the jury. *R. v. Shimmim*, 15 Cox, C. C. 122. Upon the trial of O'Donnell for the murder of the informer Carey, Mr. Charles Russell, Q. C., for the defence, after objection taken and withdrawn by the Attorney-General, stated the prisoner's own account of the transaction, Dec., 1883. It subsequently transpired that Her Majesty's judges had come to a determination upon the question:—

"At a meeting of all the judges liable to try prisoners, held in the Queen's Bench room on the 26th Nov., 1881 (present—Lord Chief Justice Coleridge, Lord Justice Baggallay, Lord Justice Brett, Lord Justice Cotton, Lord Justice Lush, Lord Justice Lindley, Justice Grove, Justice Denman, Baron Pollock, Justice Field, Justice Manisty, Justice Hawkins, Justice Lopes, Justice Fry, Justice Stephen, Justice Bowen, Justice Mathew, Justice Cave, Justice Kay, Justice Chitty, Justice North), Lord Coleridge stated the subjects for which the meeting was summoned, and Lord Justice Brett moved the following resolution:—'That in the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence.'

"Justice Stephen moved the following amendment:—'That in the opinion of the judges it is undesirable to express any opinion upon the matter.'

"This amendment, having been put to the meeting, was negatived by nineteen votes to two. The original motion was then put, and carried by nineteen votes against two (Justice Hawkins and Justice Stephen *diss.*). The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing up of the judge, when their counsel have addressed the jury, was then considered, and after some discussion was adjourned for further consideration."

Formerly prisoners charged with felony were not allowed to make their defence by counsel, but now the 6 & 7 Will. 4, c. 114, s. 1, after reciting that "it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them," enacts that "all persons tried for felony shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel

learned in the law, or by attorney, in courts where attorneys practise as counsel." And by s. 2, "in all cases of summary conviction persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney."

Right to reply.¹ Wherever any witnesses are called for the defence, or any documents put in on behalf of the defendant, at any time in the course of the trial, the counsel for the prosecution will have a right, at the conclusion of the defence, to address the jury in reply. This is so laid down as to depositions offered as evidence on the part *of the defendant in the rules drawn up by the judges after the passing of the Prisoners' Counsel Act (see p. 67); but the [*221 practice is precisely similar in all cases. An effort is frequently made to induce the court itself to refer to the depositions, and to have them read, either with the view of contradicting a witness without giving the other side a right to reply, or in order to get the prisoner's statement before the jury (*supra*, p. 143), and this is generally done. Coleridge, J., doubted whether this course would not equally give the counsel for the prosecution a right to reply; *R. v. Edwards*, 8 Car. & P. 26, 34 E. C. L.

Although the evidence brought for the defence be only as to character, the right to reply still exists, but it is seldom exercised, *supra*, p. 218.

Where four prisoners were jointly indicted, two for stealing a sheep, and two for receiving separate parts of the sheep so stolen, and the counsel for the receivers put in the depositions to contradict the case against them, by showing a variation between the testimony of the principal witness and his deposition, but no evidence was given on behalf of the other prisoners: Parke, B., after conferring with Coltman, J., stated that the reply must be confined altogether to the case of the receivers. His lordship added, that he did not wish to lay down a general rule, that in no case, where several were indicted together, would witnesses being called by one entitle the prosecutor to reply against all, but in the case before him the offences were distinct, as the receiver might have been indicted separately from the principals; *R. v. Hayes*, 2 Moo. & R. 155. Three prisoners were indicted for murder, and witnesses were called for the defence of one only; Talford, J., held that the counsel for the prosecution was entitled to reply generally on the case, and was not to be limited in his reply to the case as against the prisoner for whom the witnesses were called, although the evidence adduced for the one prisoner did not affect the case as it respected the other two prisoners; *R. v. Blackburn*, 3 C. & K. 330. Where two prisoners were indicted for night poaching, one of whom called witnesses to prove an *alibi*, and the other called none,

¹ Evidence which tends to prove the crime charged is not rebutting testimony, and must be introduced before the prosecution rests. *People v. Quick*, 58 Mich. 321: but where the evidence is really rebutting it is no objection to it that it has a tendency also to make out the charge contained in the indictment. *People v. Buddensieck*, 4 N. Y. Crim. Rep. 230.

Williams, J., allowed the counsel for the prosecution to reply on the whole case; *R. v. Briggs*, 1 F. & F. 106. But in *R. v. Burton*, 2 F. & F. 788, Wightman, J., advised the counsel for the prosecution to confine his remarks to the case of the prisoner who had called witnesses. *R. v. Trevelli*, 15 Cox, C. C. 289.

A. and B., the drivers of rival omnibuses, were indicted for the manslaughter of C., caused by their negligence in driving. After the case for the prosecution had closed, and A.'s counsel had addressed the jury, witnesses were called on behalf of B., for the purpose of throwing all the blame on A.; it was held that the counsel for A. was entitled to cross-examine B.'s witnesses, and again to address the jury. *R. v. Wood*, 6 Cox, C. C. 224; *R. v. Burdett*, 24 L. J., M. C. 63.

Where there were cross-indictments for assault to be tried as traverses at the assizes, and the same transaction was the subject-matter of both indictments, Gurney, B., directed the jury to be sworn on both traverses, and the counsel for the prosecution of the indictment first entered to open his case and call his witnesses; and then the counsel on the other side to open his case and call his witnesses; neither side to have a reply. *R. v. Wanklyn*, 8 C. & P. 290, 34 E. C. L.

The attorney-general of England, prosecuting for the crown in person, has the right to reply, whether the witnesses be called or not. *222] *This is admitted: but it is doubtful whether the crown has the right in any, and, if any, what other cases. In *R. v. Esdaile*, 1 F. & F. 213, a prosecution instituted by the crown, the right was exercised without objection by the counsel for the crown, who was not attorney-general. In *R. v. Beckwith*, 7 Cox, C. C. 505, a prosecution instituted by the poor-law board, Byles, J., refused to permit it, saying that the right was confined to the attorney-general of England in person, and that he wished it were not allowed even in that case. In *R. v. Christie*, 1 F. & F. 75, a prosecution at Liverpool directed by the Board of Trade, Martin, B., refused to permit it to the attorney-general of the county palatine, and said that he thought the practice in any case was a bad one. In *R. v. Taylor*, 1 F. & F. 535, Byles, J., said, he did not admit the right in the case of counsel, not the attorney-general prosecuting for the mint. On the other hand, in *R. v. Gardner*, 1 C. & K. 628, 47 E. C. L., where it was stated by the counsel for the prosecution that he appeared as the representative of the attorney-general, it was held by Pollock, C. B., that he was entitled to the right.¹

¹ Where provisions exist for a bill of exceptions and a writ of error the charge of the court and its instruction to the jury become of importance. On this subject the following decisions may be noted. The charge is to be taken as a whole. *State v. Hannibal*, 37 La. An. 619. A new trial will not be granted because there is not a separate instruction on each individual point. *People v. Welch*, 49 Cal. 174; *People v. Doyell*, 48 Cal. 85; *People v. Cruger*, 4 N. Y. Crim. Rep. 60; *People v. Cleveland*, 49 Cal. 578. Points submitted for the court to charge on must be clear and explicit. *Peterson v. State*, 74 Ala. 34. The court cannot submit to the jury a question of mere law. *People v. Ivey*, 49 Cal. 56. Nor evidence which is merely hypothetical. *Id.* *Henderson v. State*, 49 Ala. 20. In trials for felony, the court must, whether asked or

Discharge of jury without verdict. If a jurymen be taken ill so as to be incapable of attending through the trial, the jury may be discharged and the prisoner tried *de novo*; another jurymen may be added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn *de novo*; *R. v. Edward*, Russ. & Ry. 224; 4 Taunt. 309; 2 Leach, 621 (n); *Reg. v. Ashe*, 1 Cox, C. C. 150. So if during the trial the prisoner be taken so ill that he is incapable of remaining at the bar, the judge may discharge the jury, and, on the prisoner's recovery, another jury may be returned, and the proceedings commenced *de novo*. The court, on a trial for a misdemeanor, doubted whether in such a case the consent of counsel was sufficient to justify the proceeding with the trial in the absence of the defendant. *R. v. Streek*, *coram Park, J.*, 2 C. & P. 413, 12 E. C. L.; *R. v. Gourmon*, 2 Leach, C. C. 546.

When the evidence on both sides is closed, or after any evidence has been given, the jury cannot be discharged, unless in case of evident necessity (as in the cases above mentioned), till they have given in their verdict, but are to consider of it and deliver it in open court.¹ But the judges may adjourn while the jury are withdrawn to

not, charge on the law applicable thereto. *Cole v. State*, 40 Tex. 147; *Marshall v. State*, Id. 200. So of such a defence as insanity. *Thomas v. State*, 40 Tex. 61. Wherever there is evidence of guilt the court must charge on the law applicable thereto. *Hudson v. State*, 40 Tex. 12; *Haynes v. State*, Id. 52; *Marshall v. State*, Id. 200; *Pefferling v. State*, Id. 486; *Taliaferro v. State*, Id. 523. But where there is no evidence such as would reduce the offence in degree the court may refuse to charge on the distinction between the degrees. *Hudson v. State*, 40 Tex. 12; *Crisson v. State*, 51 Ga. 597; *Bird v. State*, 50 Ga. 585. The court should refuse an instruction which assumes that to be in evidence which is not so. *People v. Cotta*, 49 Cal. 166. So in answering a point it may strike out irrelevant matter. Id. Objection to the charge must be made at the time of delivery. *Vanwey v. State*, 41 Tex. 639. The charge of the court is not reversible for misleading tendencies when correct principles of law are announced. They should be corrected at the time by points presented to the judge. *Williams v. State*, 74 Ala. 18. *Contra, State v. Ballard*, 19 Neb. 609. The court must not charge upon the weight of the evidence. *Walker v. State*, 42 Tex. 350; *People v. Vasquez*, 49 Cal. 560; *Maclin v. State*, 44 Ark. 115. Nor draw any inference which is within the province of the jury. *Slattery v. State*, 41 Tex. 619. Even where the statutes make the jury judges of the law, it is not error for the judge to tell them that they should take it from the court unless they believe themselves the better judges of it. *Mullenex v. People*, 76 Ill. 211. The defendant cannot complain if the instructions are more favorable than they should have been. *People v. Ah Kong*, 49 Cal. 6.

¹ In cases not capital where there is no prospect of agreement, a juror may be withdrawn without the defendant's consent. *Commonwealth v. Bowden*, 9 Mass. 494; *Commonwealth v. Wood*, 12 Mass. 313; *People v. Alcott*, 2 Johns. Cas. 301; *State v. Woodruff*, 2 Day, (Conn.) 504; *People v. Barrett et al.*, 2 Caines, 100; *People v. Denton*, 2 Johns. Cas. 275. In capital cases the court may discharge a jury in case of necessity. *United States v. Haskell*, 4 Wash. C. C. 402; *Commonwealth v. Cook*, 6 S. & R. 580; but mere inability to agree is not such a case, nor does it arise from the illness of some of the jury, if such illness can be removed by permitting refreshments, and the court, against the consent and prayer of the prisoner, refuse such refreshment, unless a majority of the jury agree to receive them. *Commonwealth v. Clew*, 3 R. 408. If under such circumstances the jury are discharged, the defendant may plead it in bar to another trial. Id. When the jury are discharged unwarrantably, it is equivalent to an acquittal; the law to warrant the discharge of the jury must be one of uncontrollable emergency. *State v. Brown*, 12 Conn. 54; *State v. Abram*, 4 Ala. 272;

confer, and may return to receive the verdict in open court. 4 Bl. Com. 360. And when a criminal trial runs to such length that it cannot be concluded in one day, the court, by its own authority, may adjourn till next morning. But the jury must be kept together (at least, in a capital case), that they may have no communication but with each other. *R. v. Stone*, 6 T. R. 527; *Stephen's Summary*, 313. It is a general rule that, upon a trial for treason or felony, there can be no separation of the jury after the evidence is entered upon, and before a verdict is given. *R. v. Langhorn*, 7 How. St. Tr. 497; *R. v. Hardy*, 24 Id. 414.¹ In the latter case, on the first night of the trial, beds were provided for the jury at the Old Bailey, and the court adjourned till the next morning. On the second night, with the consent of the counsel on both sides, the court permitted the jury to pass the night at a tavern, whither they were conducted by the under-sheriffs and four officers sworn to keep the jury. Id. 572. In *223] *misdemeanors the practice has been to allow the jury to separate. See *R. v. Kinnear*, 2 B. & Ald. 462.²

Ned v. State, 7 Post. 187; *United States v. Shoemaker*, 2 McL. 114; *State v. Davis*, 4 Blackf. 345. [*Hines v. State*, 24 Ohio St. 134.] After the jury are impanelled and witnesses sworn, the prosecuting attorney has no right to enter a *nolle prosequi* because the evidence is not sufficient to convict, and such entry is equivalent to a verdict of acquittal. *Mount v. State*, 14 O. 295. On an indictment when a jury may find the defendant guilty of a lesser offence than is charged, an acquittal for the greater crime is a bar to a subsequent indictment for the lesser. *State v. Standifer*, 5 Post. 523; *People v. McGowan*, 17 Wend. 386. If the judgment is arrested, however, even for an insufficient cause, the prisoner may be tried again. *Gerhard v. People*, 3 Scam. 362. An acquittal by a jury, in a court of the United States, of a defendant who is then indicted for an offence of which that court has no jurisdiction, is no bar to an indictment against him for the same offence in a State court. *Commonwealth v. Peters*, 12 Metc. 387. If a jury in a capital case separate without giving a verdict, the prisoner is acquitted. *State v. Garrigues*, 1 Hayw. 241. But in Connecticut it is otherwise. *State v. Babcock*, 1 Conn. 401. See *State v. Hall*, 4 Hals. 236; *United States v. Fries*, 3 Dall. 515; *State v. Anderson*, 2 Bail. 565; *Atkins v. State*, 16 Ark. 568; *McCreary v. Commonwealth*, 5 Cas. 323; *Miller v. State*, 8 Ind. 325; *Barrett v. State*, 35 Ala. 406; *McCorkle v. State*, 14 Ind. 39; *Wright v. State*, 5 Ind. 290; *Poage v. State*, 3 O. St. 229; *State v. Fetter*, 25 Ia. 67; *State v. Ryan*, 13 Minn. 370; *Russell v. People*, 44 Ill. 508; *Dobbins v. State*, 14 O. St. 493; *Reins v. People*, 80 Ill. 256; *Josephine v. State*, 39 Miss. 613; *Shaffer v. State*, 27 Ind. 131; *State v. Bullock*, 63 N. C. 570; *State v. Prince*, Id. 528; *State v. Walker*, 26 Ind. 346; *State v. Nelson*, Id. 366; *Black v. State*, 36 Ga. 447; *State v. Vankirk*, 27 Ind. 121; *State v. Herrick*, 3 Nev. 259. When a jury retire to consider their verdict in any criminal case they must be placed in the charge of a sworn officer; and the omission of this requirement, without the consent of the accused, will be ground of reversal. *McIntyre v. People*, 38 Ill. 514. When defendant objected to one of the jurors upon a matter coming out after he was sworn, and in consequence the jury are discharged, it does not amount to an acquittal. *Stewart v. State*, 15 O. St. 155. A juror on a murder trial became sick; but the defendant insisted on a verdict before the discharge of the jury; the court, however, discharged the jury without further hearing from the sick juror; held that this was a bar to a retrial of the defendant. *Rulo v. State*, 19 Ind. 298. S.

¹ As to what separation of the jury is ground for reversal of judgment, *Jenkins v. State*, 41 Tex. 128.

² In misdemeanors, mere separation by the jury, before they have rendered their verdict, if there be no further abuses, will not vitiate the verdict. *Commonwealth v. Heller*, 5 Phila. 123; *Commonwealth v. Clemmer*, 2 County Ct. Rep. (Pa.) 629; *People v. Douglas*, 4 Cow. (N. Y.) 32; *State v. Engle*, 13 Ohio, 490.

It is not a sufficient ground for discharging a jury, that a material witness for the crown is not acquainted with the nature of an oath, though this is discovered before any evidence is given. *R. v. Wade*, 1 Moody, C. C. 86, *ante*, p. 116. So where, during the trial of a felony, it was discovered that the prisoner had a relation on the jury, Erskine, J., after consulting Tindal, C. J., held that he had no power to discharge the jury, but that the trial must proceed; *R. v. Wardle*, Carr. & M. 647, 41 E. C. L. If it should appear in the course of a trial that the prisoner is insane, the judge may order the jury to be discharged, that he may be tried after the recovery of his understanding. 1 Hale, P. C. 34; 18 St. Tr. 411; Russ. & Ry. 431 (n). On a trial for manslaughter, it was discovered, after the swearing of the jury, that the surgeon who had examined the body was absent, and the prisoner prayed that the jury might be discharged; they were discharged accordingly, and the prisoner was tried the next day. *R. v. Stoke*, 6 C. & P. 151, 25 E. C. L. As to postponing the trial, see *supra*, p. 199.

In the case of *R. v. Davison*, removed by *certiorari* into the Central Criminal Court, the prisoner demurred on the ground that he had been tried before for the same offence, and that the jury were discharged, and that no sufficient reason was alleged why the jury were so discharged. The fact that the prisoner had previously been tried, and that the jury had been discharged because they could not agree, was stated on the record. The learned judges, however, who tried the case (*Williams and Hill, JJ.*), said, that the discharge of the jury was a matter for the discretion of the judge, and which must be assumed to be for some valid reason, and they overruled the demurrer. They also said that no notice of the reason why the jury were discharged need have been taken on the record. 2 F. & F. 250.

The power to discharge a jury was very much discussed in a case of *R. v. Charlesworth*, 31 L. J., M. C. 25, which came before the court on several occasions. It was an information for bribery, at the suit of the crown, and at the trial a witness refused to give evidence. Hill, J., committed the witness to prison, and a conviction being impossible, discharged the jury. The defendant then applied for leave to place upon the record a plea setting out these facts, but this the court refused to permit, on the ground that there was already a plea of not guilty upon the record, and that in misdemeanor a defendant could not plead two different pleas; but they said the facts stated in the plea might be placed upon the record as part of the proceedings, which was accordingly done. A rule was then obtained, calling upon the crown to show cause why judgment *quod eat sine die* should not be entered for the defendant, and why the award of jury process and all other proceedings should not be set aside. The rule was discharged, the court being of opinion that, whether the judge had power to discharge the jury or not, the defendant was not entitled to final judgment, and that the new trial ought to proceed; it being open to the defendant to take advantage of the objection (if any)

upon a writ of error. The judgments of the court contain a great deal of extra-judicial opinion as to what power a judge has to discharge a jury, and the weight of opinion seems to incline to that power being limited in *law* only by the discretion of the judge; but that it *ought* not to be exercised, except in some cases of physical *224] *necessity; or where it is hopeless that the jury will agree, or where there have been some practices to defeat the ends of justice. Much reliance is placed by the court on the opinion of Crampton, J., in the case of *Conway v. Reg.*, 7 Ir. Law Rep. 149; 1 Cox, C. C. R. 210, where that learned judge differed from his brethren, and took substantially the view taken by the Court of Queen's Bench in England in *R. v. Charlesworth*. This question was fully discussed in *Winsor v. R. L. R.*, 1 Q. B. 390; 35 L. J., M. C. 121, 161, in which it was held by the Court of Exchequer Chamber, that a judge had power in the case of murder to discharge the jury before verdict, when a high degree of need for such discharge was made evident to his mind from the facts which he had ascertained. They held further, that the exercise of this discretion could not be reviewed by a court of error, and that such a discharge did not prevent the prisoner from being tried a second time.

Verdict. If by mistake the jury deliver a wrong verdict (as where it is delivered without the concurrence of all), and it is recorded, and a few minutes elapse before they correct the mistake, the record of the verdict may also be corrected; *R. v. Parkins*, 1 Moody, C. C. 46. In *R. v. Vodden, Dears*, C. C. 229; 23 L. J., M. C. 7, one of the jury pronounced a verdict of "not guilty," which was entered by the clerk of the peace in his minute book, and the prisoner was discharged; other jurymen then interfered, and said their verdict was "guilty;" whereupon the prisoner was brought back, and the jury being again asked for their verdict, they all said it was "guilty," and that they had been unanimous; a verdict of guilty having been recorded, it was held by the Court of Criminal Appeal that the verdict was properly amended, and that the conviction must stand.

The jury have a right to find either a general or a special verdict, 4 Bl. Comm. 361; 1 Chitty, C. L. 637, 642; Mayor, etc., of *Devizes v. Clark*, 3 A. & E. 506, 30 E. C. L. And in a case of felony, although a judge may make the suggestion, he will not direct the jury to find special facts, and they may, if they think proper, return a general verdict, instead of finding special facts, with a view to raise a question of law. *Per Lord Abinger, C. B., R. v. Allday*, 8 C. & P. 136, 34 E. C. L.¹ Upon an indictment for stealing a watch, the jury

¹ A juror may dissent at the last moment from the verdict as rendered by his fellow-jurors, but it must be from a doubt as to a question of fact. With the legal effect of the verdict he has nothing to do. *Fitzpatrick v. Himmelman*, 48 Cal. 588. The privilege of polling the jury, to ascertain their verdict, is a legal right. *Tilton v. State*, 52 Ga. 478. Where there is more than one count the verdict should specify upon which the prisoner is found guilty. *Day v. People*, 76 Ill. 380. Where it fails to do so, and there are different grades of offence, the legal intendment is that reference is had to the highest grade. *Dean v. State*, 43 Ga. 218; *Adams v. State*, 52 Ga. 565. A general verdict is all the law requires, if the several counts refer to one crime

returned the following verdict:—"We find the prisoner not guilty of stealing the watch, but guilty of keeping it, in the hope of reward, from the time he first had the watch." Held, by the Court of Criminal Appeal, that this finding amounted to a verdict of "not guilty." *R. v. York*, 1 Den. C. C. R. 335; 18 L. J., M. C. 38. Special verdicts which may be returned by statute, in cases in which the prisoner is proved to have been guilty of a minor offence to that with which he is charged, will be found, *ante*, p. 82. The verdict which under 46 & 47 Vict. c. 38, s. 2, is returnable in cases of insanity, will be found set out, *post*, title "Insanity."

A judge is not bound to receive the first verdict which the jury give unless the jury insist on having it recorded. He may direct them to reconsider it, and the verdict which the jury ultimately returned is the true verdict. *R. v. Meany*, 32 L. J., M. C. 24; L. & C. 213.

Arraignment on previous conviction. Formerly where a prisoner was charged in one count with a subsequent offence, and in another *with a previous conviction, it was the practice to arraign him [*225 on the whole indictment; but if, at the request of his counsel, he was arraigned on that count charging the subsequent offence only, it was held that he might afterwards be arraigned and legally convicted on the count charging a previous conviction. *R. v. M'Evin*, 1 Bell, C. C. 20.

Now, by the 24 & 25 Vict. c. 96, s. 116, in any indictment for any and only differ in the description of the means used. *Kilgore v. State*, 74 Ala. 1; *Jackson v. State*, 74 Ala. 26; *White v. State*, 74 Ala. 31. A general verdict on good and bad counts will be referred to the good. *Barber v. State*, 73 Ala. 19. A verdict is not vitiated by a recommendation to mercy. *Stephens v. State*, 51 Ga. 236. *Wair v. State*, Id. 303. If such a verdict is set aside on appeal, it has no effect on a subsequent verdict. *Greer v. State*, 3 Baxt. (Tenn.) 321. See generally *People v. Buckley*, 49 Cal. 241; *People v. Perdue*, Id. 425; *People v. Welch*, 49 Cal. 174; *State v. Lawrence*, 38 Iowa, 51. A verdict of guilty as charged in the information is sufficient, where the information included both robbery and grand larceny. *People v. Gilbert*, 60 Cal. 108. Compare *Arnold v. State*, 51 Ga. 144. A verdict of guilty as charged is bad, and will not sustain a conviction and sentence of murder in the first degree if the indictment is such as to sustain a verdict in the second degree. *Colbath v. State*, 2 Tex. App. 391; *Krebbs v. State*, 3 Tex. App. 348. Where a statute imposes an increased penalty for a third conviction of larceny, if the jury shall find from the record and other evidence the fact of former convictions, the jury is bound to find separately on the question of former convictions. *Rector v. Commonwealth*, 80 Ky. 468. The jury must base their verdict upon the evidence before them, and cannot retire to make an inspection out of court upon which to form an opinion. *Smith v. State*, 42 Tex. 444. That the accused is a "colored person," as described in the indictment, may be found by the jury on their own observation of him in court without further testimony. *Garvin v. State*, 52 Miss. 207. So the jury may determine the sex of the defendant by inspection in court. *White v. State*, 74 Ala. 31. The propriety of ordering a view by a jury is within the discretion of the court. It is not allowable for the purpose of furnishing evidence, but to enable the jury to understand and apply evidence given in court. *Chute v. State*, 19 Minn. 271. The Supreme Court will not disturb a verdict where the evidence is conflicting. *Williams v. State*, 45 Ind. 157. On sealed verdicts. *Commonwealth v. Carrington*, 116 Mass. 37; *Anon.*, 63 Me. 590. That defendant's consent is necessary. See *People v. Kelly*, 46 Cal. 357. See also *Commonwealth v. Tobin*, 125 Mass. 203. Defendant must be present when the verdict is rendered. *Smith v. People*, 8 Cal. 457.

offence punishable under that act (larceny and offences connected therewith), "the offender shall, in the first instance, be arraigned upon so much of the indictment as charges the subsequent offence;" and after the inquiry into the subsequent offence is concluded, "he shall then, and not before, be asked whether he had previously been convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged," etc. The 24 & 25 Vict. c. 99, s. 37, contains a precisely similar provision with respect to offences relating to the coin, and under this section, also, the prisoner must first be arraigned and tried for the subsequent offence and a verdict be taken; and this section applies to offences under sect. 12 of that Act, see *post*, tit. "Coining," and *R. v. Martin*, L. R. 1 C. C. R. 214; 39 L. J., M. C. 31. Evidence may, however, be given of the previous conviction during the trial for the subsequent offence if the prisoner gives evidence of good character (24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37). By the 34 & 35 Vict. c. 112, s. 19, see *ante*, p. 98, after evidence has been given that the stolen property has been found in the prisoner's possession, evidence of a previous conviction may be given at any stage of the proceedings.

3. THE JUDGMENT.

Arrest of judgment. A motion in arrest of judgment may be made for any substantial defect which appears on the face of the record.¹ It is made at the time when the defendant is called up to receive judgment, and cannot be made after judgment is given. Formal defects, apparent on the face of the indictment, which were formerly ground for arrest of judgment, can now only be taken advantage of by demurrer, or motion to quash the indictment, and not afterwards; 14 & 15 Vict. c. 100, s. 25. See this statute and the cases cited, *ante*, p. 208. If the objections taken in arrest of judgment be valid, the whole proceedings will be set aside; but the party may be indicted again.² 4 Rep. 45; 4 Bl. Comm. 375.

¹ On a motion for arrest of judgment, the court cannot consider matters *dehors* the record. *State v. Gerrish*, 78 Me. 20; *People v. Buddensieck*, 4 N. Y. Crim. Rep. 230. See *State v. Hamilton*, 17 S. C. 462.

² One good count, even if others are defective, will support a general verdict of guilty. *People v. Stein*, 1 Park. C. R. 202; *Baron v. People*, Id. 246; *Stoughton v. Ohio*, 2 O. St. 562; *United States*, 4 McL. 23; *State v. Burke*, 33 Me. 574; *Hazen v. Commonwealth*, 23 Pa. St. 355; *Commonwealth v. Hawkins*, 3 Gray, 463; *State v. Rutherford*, 13 Tex. 24; *United States v. Potter*, 6 McL. 186; *State v. Montgomery*, 28 Mo. 594; *Johnson v. State*, 5 Dutch. 453; *Ingram v. State*, 39 Ala. 247; *Turner v. State*, 40 Id. 21; *Montgomery v. State*, Id. 684; *State v. Tisdale*, 1 Phil. (Law), 220; *Commonwealth v. Desmarteau*, 82 Mass. 1; *State v. Mayberry*, 48 Me. 218; *Arlen v. State*, 18 N. H. 563; *Moody v. State*, 1 W. Va. 337; *People v. Davis*, 45 Barb. 494; *Hiner v. People*, 34 Ill. 297. 8.

The refusal of the judge to quash a count in an indictment, on the ground of insufficiency, is not error where the evidence supports the counts on which the prisoner

Judgment. The 11 Geo. 4 & 1 Will. 4, c. 70, s. 9 (the 1 & 2 Will. 4, c. 31, s. 4, I.), enacts, that "upon all trials for felonies or misdemeanors, upon any record in the Court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the Court of King's *Bench, or such cases of informations filed by his Majesty's attorney-general, wherein the attorney-general shall pray that [*226 the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of *nisi prius*, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had, or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and, in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison." On a trial at bar, the court may, under 11 Geo. 4 & 1 Will. 4, c. 70, s. 7, appoint such days as they shall think fit for the trial, and may pass sentence out of term, if on one of the days so appointed. *R. v. Castro*, 6 Ap. Ca. 229; 50 L. J., H. L. 497.¹

It is not necessary in recording sentence to refer to the statute which gives the punishment. *Murray v. Reg.* (in error), 7 Q. B. 700, 53 E. C. L.; 14 L. J., Q. B. 357.

Where judgment on a record of the Q. B. is pronounced at the assizes, under the above section, the court on motion under that clause may, if they think fit, amend the judgment by ordering it to be arrested. *Reg. v. Nott*, 4 Q. B. 768, 45 E. C. L. A sentence of imprisonment passed at *nisi prius*, under the above section, the defendant not being present, may declare that the imprisonment shall commence on the day on which he shall be taken to and confined to prison. *King v. Reg.*, 7 Q. B. 782, 53 E. C. L.; 14 L. J., M. C. 172.

Where there are several felonies or misdemeanors charged in the was convicted, and no evidence was admitted particularly applicable to the insufficient count, but incompetent under the others. *Commonwealth v. Andrews*, 132 Mass. 263. *United States v. Plumer*, 3 Cliff. 28. Errors of form are cured by the verdict. It is no ground for arrest of judgment, that the facts set forth in the indictment do not constitute a public offence. *People v. Swenson*, 49 Cal. 388. A count on which the jury is silent may be disregarded, and the case proceed to judgment on the verdict, if there be another count sufficient to support it. *State v. Watson*, 63 Me. 128; *Anon.*, Id. 590.

¹ Where sentence is suspended and the prisoner allowed to go on his own recognizance, it is not competent for a judge other than the trial judge, holding court temporarily at another term, to sentence such offender. *Weaver v. People*, 33 Mich. 296.

indictment, care must be taken in passing sentence, and also in making up the record, that no error is made which will vitiate the judgment. There is some obscurity as to what will constitute error in this respect. In *R. v. Powell*, 2 Barn. & Adol. 75, 22 E. C. L., the first count of the indictment charged an assault with intent to ravish, the second a common assault. The record stated that the jury found that "the said H. P. is guilty of the misdemeanor and offence in the said indictment specified, in the manner and form as by the said indictment is alleged against him; whereupon all and singular the premises being seen, etc., it is considered and adjudged by the court here, that the said H. P., for the said misdemeanor, be imprisoned in the house of correction at Guildford, in the said county of Surrey, for the space of two years, and be there kept to hard labor." The Court of Q. B. held upon a writ of error that the word "misdemeanor" was *nomen collectivum*, and that the finding of the jury and the judgment applied therefore to the whole indictment, and were good. In the case of *O'Connell v. Reg.*, 11 Cl. & F. 155, the indictment contained several counts charging different offences against various defendants. The judgment against each of the defendants was stated in the record to be "in respect of the offences aforesaid." Some of the counts turned out to be bad. A large majority both of the English and Irish judges thought that the judgment being warranted by the counts which were good ought to be confirmed, and in this opinion Lord Brougham and Lord Lyndhurst concurred; but Lord Cottenham, Lord Campbell, *and Lord Denman thought otherwise; and the judgment was
*227] reversed. In *Campbell v. Reg.*, 11 Q. B. 799, 63 E. C. L.; 14 L. J., M. C. 76, there were two counts in the indictment, one charging a stealing in the dwelling-house of D. the moneys of D., above the value of 5*l.*, the other for a simple larceny of the moneys of D. (not other moneys). The record stated the finding of the jury against the prisoners to be "guilty of the felony aforesaid on them above charged as aforesaid," and the judgment to be that the said prisoners "be transported beyond the seas, etc., for the term of ten years." The Court of Queen's Bench held that the word "felony" in this record could not be construed in the same way as the word "misdemeanor" in *R. v. Powell*, *supra*, namely, as *nomen collectivum*, so that it was uncertain to which of the felonies charged the finding of the jury applied; and that as the judgment of transportation for ten years was applicable to the first felony charged only, the judgment was erroneous and reversed. The Court of Exchequer Chamber confirmed this decision.

It was said in the course of the discussion in this case that, even if the word "felony" could be construed in the way contended for, the judgment was erroneous, on the authority of *O'Connell v. Reg.*, *supra*; but the Court of Exchequer Chamber seemed to think otherwise, and that in that case the judgment would have been good.

In *Gregory v. Reg.*, 15 Q. B. 957, 69 E. C. L.; 19 L. J., Q. B. 367, the sentence passed by the judge was, that "for and in respect of the offences charged upon him in and by each and every count of the

said indictment, he the said defendant be imprisoned in the Queen's prison for the space of six calendar months now next ensuing." The judgment as stated in the record was that the said B. G., for his offences aforesaid, whereof he is convicted as aforesaid, be imprisoned in the Queen's prison for the space of six calendar months now next ensuing. The Court of Exchequer Chamber seemed to think that the judgment as stated in the record was in form a sentence of one term of six months' imprisonment upon the whole indictment, and would, therefore, be erroneous if any count were bad. No final opinion was, however, expressed, because on an application on the part of the prosecution the court below allowed the judgment to be amended according to the sentence passed, a note of which was contained in the master's book. Where the record set out the finding and judgment on the second count of an indictment, but omitted to notice the finding or judgment on the first, it was held that each count for the purpose of the verdict was a distinct indictment, and that, as there was a good finding upon a good count, the defendant might be convicted upon it. *Latham v. R.*, 9 Cox, C. C. 516; 5 B. & S. 635, 117 E. C. L.; 33 L. J., M. C. 197.

The difficulty may now be frequently got over by the power conferred by the 11 & 12 Vict. c. 78, s. 5, which provides that "whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition." Under this statute, where the prisoner is convicted on good and bad counts, and judgment is entered generally on all or on a bad count, the Court of Error may arrest the judgment on the bad counts, and enter judgment, or direct *it to be entered on the good ones. *Holloway v. Reg.*, 2 Dears. [*228 C. C. 287; 17 Q. B. 319, 79 E. C. L.

The form in which sentence was passed in *Gregory v. Reg.*, *supra*, was said by Lord Denman (p. 968 of the report) to be that which the judges had adopted in order to avoid the objection raised in *O'Connell v. Reg.* And the best plan in making up the record will be to state a separate judgment for each count. See *Gregory v. Reg.*, p. 973 of the report.

An offender, upon whom sentence of death has been passed, ought not, while under that sentence, to be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder. *Anon.*, Russ. & Ry. 268.

By the 24 & 25 Vict. c. 100, s. 2 (repealing the 6 & 7 Will. 4, c. 30, s. 2), "Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution, and all the proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as a sentence of death

might have been pronounced and carried into execution, and all the proceedings thereupon and in respect thereof might have been had and taken, before the passing of this act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon."

By s. 3, "the body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct." See as to the sentence for murder under the old law, *R. v. Fletcher*, Russ. & R. 58; *R. v. Wyatt*, Id. 230.

Where the defendant has been convicted of a misdemeanor in the Queen's Bench, the prosecutor upon the motion for judgment may produce affidavits to be read in aggravation of the offence, and the defendant may also produce affidavits to be read in mitigation. Affidavits in aggravation are not allowed in felonies, although the record has been removed into the Court of Queen's Bench by *certiorari*. *R. v. Ellis*, 6 B. & C. 145, 13 E. C. L.; 3 Burn's Justice, 29th ed. 933. Where a prisoner pleaded guilty at the Central Criminal Court to a misdemeanor, and affidavits were filed, both in mitigation and aggravation, the judges refused to hear the speeches of counsel on either side, but formed their judgment of the case by reading the affidavits. *R. v. Gregory*, 1 C. & K. 228, 47 E. C. L.; but it is usual to hear counsel in mitigation. See also the same case as to removing from the files of the court affidavits in mitigation containing scandalous and irrelevant matter, such being a contempt of court; and also as to allowing the opposite party to deny by counter-affidavits the affidavits filed in mitigation.

Where a defendant, having pleaded guilty to an indictment, is brought up for judgment, the counsel for the crown is to be heard before the counsel for the defendant, and the affidavits in aggravation are to be read before the affidavits in mitigation. *R. v. Dignam*, 7 A. & E. 593, 34 E. C. L. *Contra*, where a verdict of guilty has been taken, though by consent, and without evidence. *R. v. Caistor*, Id. 594 (n). *Semle*, that the rule is not to be varied where several defendants are jointly indicted, and some suffer judgment by default, and others are convicted on verdict. And in such a case, where there was no affidavit in aggravation, but affidavits were offered in mitigation, *229] *the court heard the counsel for the defendants first. *R. v. Sutton*, Id.

By the 8 & 9 Vict. c. 68 (E. & I.), execution on judgments for misdemeanors may be stayed or suspended by writ of error and bail thereon. But by the 16 & 17 Vict. c. 32, no execution is to be stayed, or the defendant to be discharged from custody, till a recognizance has been given for the defendant's personal appearance, except when the writ is brought by the attorney-general. See ss. 1 *et seq.* of that statute; Reg. Gen., Q. B., E. T. 1853; 1 El. & Bl. 693, 72 E. C. L.; *Dugdale v. Reg.*, 2 El. & Bl. 129, 75 E. C. L.; 22 L. J., M. C. 50; *Sill v. Reg.*, 22 L. J., M. C. 41.

By the 33 & 34 Vict. c. 23, s. 4, the court by which judgment is

pronounced or recorded may, if it shall think fit, on application of any person aggrieved, and immediately after conviction for felony, award (to the limit of 100%) compensation for loss of property, to be deemed a judgment debt, etc., and may also condemn the prisoner to pay the prosecutor's costs; see s. 3, *post*, "Costs," p. 240.

In the case of a husband convicted of an aggravated assault upon his wife, the court may under certain circumstances give an order having the effect of a judicial separation, together with an order on the husband to pay some weekly sum to the wife for her support and for the custody of the children. 41 Vict. c. 19, s. 4.

Recording judgment of death. By the 4 Geo. 4, c. 48 (E. & I.) s. 1, "whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask, if such offender hath or knoweth anything to say, why judgment of death should not be recorded against such offender; and, in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorized to abstain from pronouncing judgment of death upon such offender; and, instead of pronouncing such judgment, to order the same to be entered on record, and thereupon such proper officer as aforesaid shall and may, and is hereby authorized to enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before which such offender shall have been convicted."

Under the 6 & 7 Will. 4, c. 30, *supra*, the court was held to be empowered to direct the sentence of death to be recorded in cases of murder. *R. v. Hogg*, 2 Moo. & R. 380. It seems doubtful whether the same would be held under the 24 & 25 Vict. c. 100, s. 2, but probably not. See Greaves' Criminal Acts, p. 30.

Juvenile offenders. The 29 & 30 Vict. c. 117, s. 14, enacts as follows:—"Whenever any offender who in the judgment of the court, justices, or magistrates before whom he is charged, is under the age of sixteen years, is convicted, on indictment, or in a summary manner, *of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the term of ten days or a longer term, the court, justices, or magistrate may also sentence him to be sent, at the expiration of his period of imprisonment, to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years; provided always, that

a youthful offender under the age of ten years shall not be so directed to be sent to a reformatory school unless he has been previously charged with some crime or offence punishable with penal servitude or imprisonment, or is sentenced in England by a judge of assize or court of general or quarter sessions, or in Scotland by a circuit court of justiciary or sheriff." The section also contains directions as to the particular school to which the youthful offender is to be sent.

Judgment upon persons found to be insane. The disposal of persons found to be insane at the time of the commission of the offence is regulated by the statute 39 & 40 Geo. 3, c. 94, *ante*, p. 198; and see 3 & 4 Vict. c. 54; 46 & 47 Vict. c. 38. As to other regulations with respect to criminal lunatics, see the 23 & 24 Vict. c. 75; 27 & 28 Vict. c. 29; and 30 & 31 Vict. c. 12.

Fines and sureties. By the 24 & 25 Vict. c. 96 (larceny), s. 117, "whenever any person shall be convicted of any indictable misdemeanor punishable under this act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behavior; and in case of any felony punishable under this act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

A similar provision is contained in the 24 & 25 Vict. c. 97 (injuries to property), s. 73; in the 24 & 25 Vict. c. 98 (forgery), s. 51; in the 24 & 25 Vict. c. 99 (coinage), s. 38; and in the 24 & 25 Vict. c. 100 (offences against the person), s. 71.

By the 24 & 25 Vict. c. 94, s. 4, an accessory after the fact may be required to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to the other punishments which may be inflicted upon him; provided that no person shall be imprisoned for not finding such sureties for more than one year.

Discharge of prisoners. By the 55 Geo. 3, c. 50, s. 4, extended by the 8 & 9 Vict. c. 114, provision is made that "every person charged with any felony or any other crime, or as an accessory thereto, before any court holding criminal jurisdiction within England and Wales, against whom no bill of indictment shall be found by the grand jury, or who on his or her trial shall be acquitted, or who shall be discharged for want of prosecution, shall be immediately set at large in open court, without payment of any fee or sum of money for or in respect of his or their discharge to any person or persons whomsoever."

Property found on the prisoner. It has been said by some judges *that a constable has no right to take away from a prisoner any property which he has about him, unless it is in some way connected with the offence with which he is charged; *per* Paterson, J., *R. v. O'Donnell*, 7 C. & P. 138, 32 E. C. L.; *R. v. Jones*, 6 C. & P. 343, 25 E. C. L.; *per* Gurney, B., *R. v. Kinsey*, 7 C. & P. 447, 32 E. C. L.; *R. v. Bass*, 2 C. & K. 822, 61 E. C. L., *per* Platt, B. And if this has been done, as is frequently the case, the court will, on the application of the prisoner, order the property to be given up to him; *R. v. Barnett*, 3 C. & P. 600, 14 E. C. L.; unless it be required as evidence. But this will not be done if the property, though not that actually stolen, is the produce of it. *R. v. Burgess*, 7 C. & P. 488, 32 E. C. L.; *R. v. Rooney*, 7 C. & P. 515, 32 E. C. L.

By the 24 & 25 Vict. c. 96, s. 100 (replacing the 7 & 8 Geo. 4, c. 29, s. 27), if any person guilty of any such felony, or misdemeanor as is mentioned in that act, "in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner, or his representative; and in every case in this section aforesaid the court before whom any person shall be tried (this does not apply to the Court of Queen's Bench; see *Walker v. Lord Mayor of London*, 38 L. J., M. C. 107) for any such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner; provided that, if it shall appear before any award or order made, that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bond fide* taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, extorted, embezzled, converted or disposed of, in such case the court shall not award or order the restitution of such security; provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent, entrusted with the possession of goods or documents of title to goods for any *misdemeanor* against this act." And see *infra*.

The court cannot, under the above provision, order a Bank of England note, which has been paid and cancelled, to be delivered up to the prosecutor of the party who stole it; *R. v. Stanton*, 7 C. & P. 431, 32 E. C. L. Where a prisoner was convicted of stealing money, and he was at the time the owner of a horse which it was clear from the evidence had been purchased with the stolen money, an order was made for the delivery of the horse to the prosecutor; *per* Gurney, B., and Williams, J., *R. v. Powell*, 7 C. & P. 646, 32 E. C. L.

After the trial and conviction of a felon, the judges who presided at the trial made an order, directing that property, found in his possession when he was apprehended, should be disposed of in a particular manner. This property was not shown to be part of the stolen property, or to be the produce of it. The Court of Queen's Bench held that the order was bad, as the judges had no jurisdiction to make it. *R. v. Corporation of London*, 27 L. J., M. C. 231.

It would appear that in the case of the prisoner's acquittal, the *232] court, though satisfied the property has been stolen, has no power to order its restitution; Greaves' Criminal Acts, 143; but in case of conviction, the court is bound by the statute to order restitution, and the order is strictly limited to property identified at the trial as being the subject of the charge. *R. v. Goldsmith*, 12 Cox, C. C. 594; *R. v. Smith*, 12 Cox, C. C. 597.

In *Horwood v. Smith*, 2 T. R. 750, and in *Scattergood v. Sylvester*, 15 Q. B. 506, 69 E. C. L.; 19 L. J., Q. B. 447, the goods had been stolen and had been sold by the thief in market overt, which passed the property (until conviction) to the purchaser. The former case was action of trover against a purchaser who had parted with the goods before the conviction of the thief, and it was held that the owner could not recover the value of them, for the property had not reverted in the owner at the time of conversion. In the latter case it was held that the owner could recover against a defendant who had the goods in his possession at the time of the conviction of the thief. The title given by the statute is a new title arising upon the conviction. In *Lindsay v. Cundy*, 1 Q. B. D. 348; 45 L. J., Q. B. 381 (reversed on appeal on another point, 3 Ap. Cas. 459; 47 L. J., Q. B. 481), the goods had been obtained under a contract by false pretences, and the property had therefore passed to the thief, and nothing was done to put an end to that contract, and the thief sold the goods to a *bona fide* purchaser. On the same principle which guided the courts in the former cases, viz., that the statute only gives a title upon the conviction, it was held that the owner could not recover against a person who had parted with the goods before the conviction. "Persons who purchase and have the good fortune to sell again before the conviction cannot be subjected to an action for taking or converting the stolen property." Add. on Torts, p. 417, 5th ed. The recent case of *Moyse v. Newton*, 4 Q. B. D. 32; 48 L. J., Q. B. 125, professes to rely upon the cases of *Horwood v. Smith*, and *Lindsay v. Cundy*, but it appears to be at variance with the *ratio decidendi* of those cases, if not with their decision, and is directly at variance with the decision in *Scattergood v. Sylvester*. *Moyse v. Newton* decides that the statute does not apply to "false pretences," although "false pretences" are expressly mentioned therein, and that the title does not arise upon conviction. On the other hand it has been held that the above section applies to cases of false pretences, and the fact that the defendant parted with the goods to a *bona fide* pawnee will not disentitle the original owner to the restitution of the goods. *R. v. Stancliffe*, 11 Cox, C. C. 318.

By the 30 & 31 Vict. c. 35, s. 9, it is provided, that where stolen property has been purchased from the prisoner the proceeds may be given back to an innocent purchaser on restitution of the property. See the statute in Appendix, and see 33 & 34 Vict. c. 23, s. 3, *post*, "Costs;" *post*, p. 420; and s. 4, *ante*, p. 229.

By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 30, sub-s. 2, if any person is convicted in any court of feloniously taking, or fraudulently obtaining any goods and chattels, and it appears to the court that the same have been pawned with a pawnbroker, the court, on proof of the ownership of the goods and chattels, may if it thinks fit, order the delivery thereof to the owner either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner, and the other circumstances of the case, seems just and fitting. The rest of the section applies only to summary jurisdiction. [*233]

By the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), part of s. 7, the prosecution of an offender by the Director of Public Prosecutions shall, for the purpose of enabling a person to obtain a restitution of property, or of obtaining, exercising, or enforcing any right, claim, or advantage whatsoever, have the same effect as if such person had been bound over to prosecute, and had prosecuted the offender, subject to this proviso, that such person shall give all reasonable information and assistance to the said Director in relation to the prosecution.

Previous conviction, effect of, on judgment. By the 7 & 8 Geo. 4, c. 28, s. 11, if any person was convicted of felony, after a previous conviction for felony, he was liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped. The above section, although unrepealed, is superseded by the 16 & 17 Vict. c. 99, and the 27 & 28 Vict. c. 47, which is amended in some respects by the 34 & 35 Vict. c. 112, and 42 & 43 Vict. c. 55. The general effect of these provisions is that where any person is sentenced to penal servitude the sentence must be for five years at least, and in case of larceny, not more than ten years (24 & 25 Vict. c. 96, s. 7); and after a previous conviction there may now be added to any punishment which the court may award police supervision for any period not greater than seven years.

In order to affect the judgment of the court under the 27 & 28 Vict. c. 47, s. 2, it is necessary that the previous conviction should be stated in the indictment, in order to give the prisoner an opportunity of having his identity tried. *R. v. Willis*, L. R. 1 C. C. R. 363; 41 L. J., M. C. 102, confirming *R. v. Summers*, L. R. 1 C. C. R. 182; 38 L. J., M. C. 62. See *ante*, p. 193.¹

¹ Under such circumstances a plea of guilty as charged confesses the previous conviction. *People v. Delany*, 49 Cal. 394.

The punishment provided for special offences, when committed after a previous conviction, will be found under the head of those offences.

4. APPEAL.

Writ of error. A writ of error lies from all inferior criminal jurisdictions to the Queen's Bench, for mistakes appearing in the judgment or other parts of the record; 4 Bl. Comm. 391.¹ There were formerly many objections which were matter of error, but which now, by the 14 & 15 Vict. c. 100, s. 25, *supra*, p. 208, must be taken by demurrer or motion to quash the indictment, and not afterwards. It has been held that error will lie in the following cases:—where the oath upon which perjury is assigned does not appear to have been taken in a judicial proceeding; *R. v. Overton*, 4 Q. B. 90, 45 E. C. L.; or the court has not competent authority to administer the oath; *R. v. Hallett*, 2 Den. C. C. 237; *R. v. Chapman*, 1 Den. C. C. 432; *Lavey v. Reg.*, 2 Den. C. C. 504. So if in an indictment for libel the words do not appear to be libellous; *R. v. Perry*, 1 Lord Raym. 158; or are insufficiently set out; *R. v. Bradlaugh*, 3 Q. B. D. 607; 48 L. J., M. C. 5; or if on an indictment for obtaining money by false *234] pretences it is not shown what the false pretences were; *R. v. Mason*, 2 T. R. 581, but this case seems to be overruled by *Heymann v. R.*, *infra*; *Holloway v. Reg.*, 2 Den. C. C. 296. If in an indictment for burglary it appears from the indictment that the prisoner broke and entered the dwelling-house with intent to commit a trespass or misdemeanor and not a felony, error would lie; *R. v. Powell*, 2 Den. C. C. 403. These and other cases are collected in *Arch. Cr. Law*, 18th ed. p. 196. It must, however, be borne in mind that in some cases the verdict will cure a defect in the indictment. See *Heymann v. R.*, L. R. 8 Q. B. 102; *R. v. Goldsmith*, L. R. 2 C. C. 74; 42 L. J., M. C. 94; *R. v. Aspinall*, 2 Q. B. D. 48; 46 L. J., M. C. 145; *R. v. Bradlaugh*, *supra*; *R. v. Knight*, 14 Cox, C. C. R. 31; *Reg. v. Oliver*, 13 Cox, C. C. R. 588; *R. v. Kelleher*, 14 Cox, C. C. R., Ir. 48. In what cases error will lie for improperly allowing or disallowing challenges is somewhat doubtful; see *Mansell v. Reg.*, *Dears. & B. C. C.* 375; *supra*, p. 216. If a verdict of the jury were returned during the absence of one of the jurors, it would be a matter of error.

It is in all cases necessary before suing out the writ of error to obtain the *fiat* of the attorney-general; but in cases of misdemeanor, on probable cause being shown, this *fiat* is understood to be granted as of course; *Ex parte Newton*, 4 E. & B. 869, 82 E. C. L.; 4 Bl. Comm. 391; and it is not generally refused if reasonable ground of error be shown to exist in other cases. But it is entirely in the discretion of the attorney-general whether or not he will grant it, and the court will

¹ Final judgment in the court below is a prerequisite to a writ of error. *Labbaite v. State*, 4 Tex. App. 169; *Wills v. State*, Id. 613; *State v. Edwards*, 35 Kan. 105. Errors must be shown of record, or they cannot be reviewed. *State v. Peterson*, 67 Iowa, 564.

not control him. *Ex parte Newton, supra*; *R. v. Lees*, 1 El. Bl. & El. 828, 96 E. C. L.; *R. v. Castro*, 6 Ap. Ca. 229; 50 L. J. (H. L.) 497.

By the 8 & 9 Vict. c. 68, amended by the 9 & 10 Vict. c. 24 and 16 & 17 Vict. c. 32, where judgment shall have been given for a misdemeanor, and the defendant shall have obtained a writ of error to reverse it, execution thereon shall be stayed, and the defendant discharged from custody, upon his entering into the recognizances, with sureties, required by those Acts. It seems that the defendant ought to be in court personally to receive sentence in the event of the judgment of the court being against him; and a rule for a reversal of judgment under 16 & 17 Vict. c. 32, s. 3, is a rule nisi only in the first instance. *R. v. Howard*, 10 Cox, C. C. 54.

As to the practice of delivering and form of paper books, see Reg. Gen., E. T., 16 Vict., 1 E. & B. 693, 72 E. C. L.

In capital cases the prisoner must appear in person to assign errors, Corn. Cr. Pr. 102; *Holloway v. Reg., supra*.

When the judgment is reversed upon a writ of error in any criminal case, the court of error may, by the provisions of the 11 & 12 Vict. c. 78, s. 5, *supra*, p. 227, pronounce the proper judgment itself, or remit the record back to the inferior court, in order that that court may do so. If the judgment be affirmed, then by the 16 & 17 Vict. c. 32, s. 4, the court of error may order the defendant, if present, to be committed to the Queen's prison; by s. 5, any judge may, if necessary, within four days issue a warrant for his apprehension.

The Court of Q. B. has power to set aside a writ of error sued out for purposes of collusion. *R. v. Alleyne, Dears. C. C. 505*.

Bill of exceptions. In the case of *R. v. Alleyne*, an indictment for obtaining money by false pretences, Lord Campbell, C. J., after hearing an argument at chambers, sealed a bill of exceptions to the admissibility of certain documents in evidence; Arch. Cr. Law, 18th ed., *p. 168; but in *R. v. Esdaile*, 1 F. & F. 213, 228, a prosecution for conspiring to defraud, the same learned judge, on a bill [*235 of exceptions to the evidence being tendered, said, "a bill of exceptions cannot be tendered in a criminal case; I once thought otherwise, but I have fully considered the subject, and am satisfied that it cannot be." It seems, at any rate, formerly to have been thought that a bill of exceptions might be tendered to the ruling of a judge in improperly disallowing a challenge; see p. 216.¹

New trial. There can be no new trial in cases of felony whether the defendant be convicted or acquitted. In *R. v. Scaife*, 17 Q. B. 238,

¹ Bills of exception are allowed in the various States of the Union by statute. *Fife v. Commonwealth*, 29 Pa. St. 429; *Wyhamer v. People*, 20 Barb. (N. Y.) 567. Obsolete and general exceptions taken for what may turn up in the future are improper. *Turner v. People*, 33 Mich. 363; *Reed v. Commonwealth*, 22 Grat. (Va.) 924. It is ground for error if the judge does not reply to a question of the jury specifically put in general terms. *Wharton v. State*, 45 Tex. 2. The admission of irrelevant testimony prejudicial to prisoner is not cured by its being stricken out where it is likely to affect the jury. *People v. Zimmerman*, 4 N. Y. Crim. Rep. 272.

79 E. C. L., where a conviction for felony was removed into the Court of Queen's Bench, a new trial was moved for on the ground of the improper reception of depositions in evidence, and was granted; but that case has not been followed, and cannot be considered to be the law. *R. v. Bertrand*, L. R. 1 P. C. 520; 36 L. J., P. C. 51; *R. v. Duncan*, 7 Q. B. D. 198; 50 L. J., M. C. 95, *post*, p. 236. See *R. v. Murphy*, L. R., 2 P. C. 535; 38 L. J., P. C. 53; and see *Winsor v. R.*, L. R. 1 Q. B. 390; 35 L. J., M. C. 161.¹

In case of a conviction for misdemeanor a new trial may be granted at the instance of the defendant, where the justice of the case requires it; *R. v. Mawbey*, 6 T. R. 638; though inferior jurisdictions cannot grant a new trial upon the merits, but only for an irregularity. (See the cases collected on this point in note (b) to *R. v. Inhab. of Oxford*, 13 East, 416.) A new trial will be granted on the ground of surprise. *R. v. Whitehouse*, Dears. C. C. R. 1.² It must be moved within the first four days of term. *R. v. Newman*, 1 El. & Bl. 268,

¹ In the United States the uniform and unquestioned practice down to a comparatively late period has been to extend to criminal cases, so far as the revision of verdicts is concerned, the same principles which have been established in civil actions; and though, except in cases of fraud, no instance exists where an acquittal has been disturbed, new trials in cases of conviction have frequently been granted. Once in New York in 1832 and once by Judge Story in 1833 has the English doctrine, that after a conviction it was out of the power of a common law court to interpose, except by the recommendation of pardon, been maintained. But plausibly as the position was sustained by Judge Story, it was afterwards abandoned in the court in which it was uttered, and is now so universally rejected that its extended discussion is no longer necessary. It is sufficient to say that neither in Federal nor State courts are there now any doubts expressed as to the right of the proper court to grant a new trial in any case in which it considers the verdict to be unjust. Wharton's *Crim. Pleading and Practice*, 8th ed., § 791, and cases cited. The right given by the New York code to the appellate court to grant a new trial can be exercised by the Supreme Court only. *People v. Donovan*, 4 N. Y. Crim. Rep. 86.

² Where the evidence is conflicting the verdict will not be lightly disturbed. *United States v. Daubner*, 17 Fed. Rep. 793; *Jones v. State*, 12 Tex. App. 156; *Land v. People*, 104 Ill. 248; *Wagner v. State*, 107 Ind. 71. A motion for arrest of judgment is proper where a defect appears upon the face of the record; but for a variance between the indictment and the proof, a motion for a new trial is the proper course. *State v. Hamilton*, 17 S. C. 462. New evidence simply tending to impeach witnesses is no ground for a new trial. *Partee v. State*, 67 Ga. 570; *Ogden v. State*, 13 Neb. 436; *Wallace v. State*, 28 Ark. 531; *Brown v. State*, 55 Ga. 169; *State v. Smith*, 35 Kan. 618. Nor the admission of immaterial evidence, when the verdict is not influenced by such evidence. *Tilly v. State*, 21 Fla. 242. Nor surprise as to what witness testifies to. *Rankin v. Commonwealth*, 82 Ky. 424. Nor an omission which works no injury to defendant. *People v. Reaves*, 4 N. Y. Crim. Rep. 1; *State v. Young*, 34 La. An. 346. The improper admission of evidence prejudicial to the defendant is ground for a new trial. *People v. Dailey*, 59 Cal. 600; *State v. Mickle*, 81 N. C. 552. But the defendant cannot complain of the admission of facts which the defence proved at a later stage of the trial. *People v. Crawford*, 48 Mich. 498. Nor that a new trial is refused where the witnesses were known, but no application was made to postpone until they might be found. *State v. Lamothe*, 37 La. An. 43. Where there is total absence of testimony, either direct or circumstantial, to establish the venue laid in the indictment, there must be a reversal. *Supra*, p. *90; *State v. McGinniss*, 74 Mo. 245. Upon newly discovered evidence and the necessary affidavits. *Runnels v. State*, 28 Ark. 121. See also, Wharton's *Crim. Pleading and Practice*, § 854. Upon a motion for a new trial the character of the judge's charge may be considered, although not excepted to when delivered. *People v. Sweeney*, 4 N. Y. Crim. Rep. 275; *Maddox v. State*, 12 Tex. App. 429. An erroneous instruction is not cured by a subsequent correct one. *State v. Dearing*, 65 Mo. 530. A judge has a right to express his opinion on

72 E. C. L.; 22 L. J., Q. B. 156. Where several defendants are tried at the same time for a misdemeanor, and some are acquitted and others convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. *R. v. Mawbey*, 6 T. R. 619; *R. v. Gompertz*, 9 Q. B. 824, 58 E. L. C.; 16 L. J., Q. B. 121. It is a rule that all the defendants convicted upon an indictment for a misdemeanor must be present in court when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance. *R. v. Teal*, 11 East, 307; *R. v. Askew*, 3 M. & S. 9. In *R. v. Caudwell*, 2 Den. C. C. R. 372 (n); 21 L. J., M. C. 48, the defendant had been convicted of perjury, and sentenced to seven years' transportation. On application on his behalf being made for a new trial, Campbell, C. J., inquired whether the defendant was present or in custody; and being answered in the negative, the court refused to hear the motion, the chief justice saying, "I have always considered it to be a hardship, where there are several defendants who have been found guilty on an indictment, not to allow one of them to move for a new trial, unless all the other defendants are present when the motion is made. But there can be no such hardship when there is but one defendant. In this case peculiarly, the defendant ought to be in court. Sentence has been passed, which he has hitherto evaded; and the court will not permit him to make the experiment of obtaining a new trial, without coming into court to abide the consequences in case we should refuse the rule." Where the defendant is liable to a fine only, it is not necessary that he should be present in

the weight of the evidence. Wharton's *Crim. Pleading and Practice*, 8th ed., § 798; *Johnston v. Commonwealth*, 85 Pa. St. 54. But see *contra*, *People v. Lyons*, 49 Mich. 78; *People v. Ah Sing*, 59 Cal. 400. He is not required to advert to each piece of evidence, it is sufficient if he tells the jury to base their verdict upon all the evidence. *State v. Reynolds*, 87 N. C. 544. On judge's charge generally: See *State v. Munson*, 76 Mo. 109; *People v. Parkhurst*, 49 Mich. 22; *Trask v. People*, 104 Ill. 569; *Harris v. State*, 13 Tex. App. 309. It is error for the judge to tell the jury that there is a presumption against the prisoner from a failure to introduce the defence of an alibi at the preliminary hearing. *Sullivan v. People*, 31 Mich. 1. Whatever tends to mislead the jury is error. *Snyder v. State*, 59 Ind. 105. On comments upon the fact that defendant testified. *Territory v. Romine*, 2 N. M. 114; *People v. Morrow*, 60 Cal. 142; Wharton's *Crim. Ev.*, § 429, 9th ed.; *Bird v. State*, 107 Ind. 154. The court need not instruct the jury that the fact the prisoner failed to testify should not prejudice him, unless requested to do so. *State v. Stevens*, 67 Ia. 557. It is not error for the judge to refuse to charge the jury that the failure of the evidence to show motive ought to operate strongly for the accused. *Clough v. State*, 7 Neb. 320. Cumulative evidence is not ground for a new trial. *Collins v. People*, 103 Ill. 21; *State v. Lamothe*, 37 La. An. 43; *Holmes v. Clark*, 54 Ga. 303; *O'Shields v. State*, 55 Ga. 698. Nor evidence of one clearly unworthy of belief. *Collins v. People*, 103 Ill. 21. It is error to refuse a new trial, where the record clearly shows that the accused was not guilty, beyond a reasonable doubt. *Marlatt v. People*, 104 Ill. 364. The indorsement of additional witnesses upon an information after going to trial is ground for a new trial. *People v. Moran*, 48 Mich. 639. That counsel mistakes testimony is not ground for a new trial. *People v. Barnhart*, 59 Cal. 402. Otherwise, where counsel in contravention of an express statute refers to the fact that defendant did not testify. *State v. Black*, 59 Ia. 390; *Long v. State*, 54 Ga. 564; *Thompson v. State*, 54 Ga. 577; *State v. Sweeny*, 37 La. An. 1. So that the prosecuting attorney argued on extraneous matter likely to prejudice the jury is ground for a new trial. *Smith v. People*, 8 Col. 457. But where such remarks are checked at once by the judge they will not be fatal to the judgment. *Petite v. People*, 8 Col. 518. See *Newton v. State*, 21 Fla. 53.

court. *R. v. Parkinson*, 2 Den. C. C. R. 459; 21 L. J., M. C. 48 (n).

No new trial can be had when the defendant is acquitted, although *the acquittal was founded on the misdirection of the judge; *236] *R. v. Jacob*, 1 Stark. N. P. 516, 2 E. C. L.; *R. v. Sutton*, 5 B. & Ad. 52, 22 E. C. L.; or where a verdict is found for a defendant on a plea of *autrefois acquit*, although that raises a collateral issue which may have been found in favor of the defendant on insufficient evidence. *R. v. Lea*, 2 Moo. C. C. R. 9; 7 C. & P. 836, 32 E. C. L., 3 Russ. by Greav. 5th ed., 319. In *R. v. Russell*, 3 E. & B. 942, 77 E. C. L.; 23 L. J., M. C. 173, Coleridge, J., was of opinion that whenever the substance of a criminal proceeding is civil, a new trial may be granted after a verdict for the defendant, on the ground either of misdirection or of the verdict being against the evidence: but Campbell, C. J., and Crompton, J., considered that the practice as to granting a new trial in a criminal case, after a verdict for the defendant, did not extend to the case where the defendant, if found guilty, might suffer fine and imprisonment; and they therefore held, that where an indictment charged the defendant with erecting an obstruction to the navigation of the Menai Straits, and the right to an oyster fishery was in question, the court ought not to grant a new trial after a verdict for the defendant. *R. v. Johnson*, 29 L. J., M. C. 133. Upon a trial of an indictment for obstructing a highway, the defendant was acquitted; and it was held that a new trial on the ground of mis-reception of evidence, misdirection, and that the verdict was against evidence, could not be granted. *R. v. Duncan*, 7 Q. B. D. 198; 50 L. J., M. C. 95.

Court of Criminal Appeal. Formerly, where any objection was taken on the part of the prisoner, during the course of the trial, which the judge considered well founded, it was usual to defer giving judgment till the next assizes, and in the meantime take the advice of the judges. But this was a mere extra-judicial proceeding, to satisfy the conscience of the presiding judge. Now, however, by 11 & 12 Vict. c. 78, it is enacted, by s. 1, "that when any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge, or commissioner, or justice of the peace before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer" (see now 44 & 45 Vict. c. 68, s. 15, *post*, p. 237), "and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment, until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit conditioned to appear at such time or times as the court shall direct, and

receive judgment, or to render himself in execution, as the case may be."

By s. 2, "That the judge or commissioner, or court of quarter sessions, shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons; and the said justices and barons" (see now 44 & 45 Vict. c. 68, s. 15, *post*, p. 237), "shall thereupon have full power and authority to hear and finally determine the said question or questions, and *thereupon to reverse, affirm, or amend any judgment which [*237 trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and the certificate of such entry under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons for the execution of the judgment as the same shall be certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognizance of bail, if any; and if the court of oyer and terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next sessions."

By the unrepealed portion of s. 3, "That the judgment or judgments of the said justices and barons (see 44 & 45 Vict. c. 68, s. 15, *infra*) shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgment of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered."

By s. 4, "That the said justices and barons, when a case has been reserved for their opinions, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended."

By 44 & 45 Vict. c. 68, s. 15, the jurisdiction and authority in relation to questions of law arising in criminal trials may be exercised by any five or more of the judges of the High Court of Justice; of whom the Lord Chief Justice of England shall always be one.

The following rules were promulgated by the Court of Criminal Appeal on the 1st June, 1850:—

That when any case shall be transferred by a court of oyer and terminer or gaol delivery, or court of quarter sessions, for the consideration of this court, the original case signed by the judge, commissioner, or chairman of sessions reserving the question of law, and *238] each party, shall be delivered to the clerk of this court at the Exchequer Chamber at Westminster, at least four days before the day appointed for the sitting of the said court.

That every case transmitted for the consideration of this court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment or the particular count.

That no case be heard upon any demurrer to the pleadings.

That every case state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognizance of bail to appear to receive judgment or to render himself in execution.

That when any case is intended to be argued by counsel or by the parties, notice thereof be given to the clerk of this court at least two days previously to the sitting of the said court.

That with every case delivered to the judges of the court (except such case as shall be reserved by such judge) the fee payable to the clerks of the said judges shall not exceed the fee payable on demurrer and other paper books, as contained in the table of fees allowed and sanctioned by the judges, pursuant to the statute 7 Will. 4 & 1 Vict. c. 30.

Upon the 11 & 12 Vict. c. 78, *supra*, it has been decided that a recorder has power to reserve questions of law under it; *R. v. Masters*, 1 Den. C. C. 332; that the court is bound to examine the validity of the indictment though no questions be reserved upon it; *R. v. Webb*, 1 Den. C. C. 338; 18 L. J., M. C. 39; that a question raised in the court below in arrest of judgment is a question arising "on the trial," and therefore properly reserved; *R. v. Morton*, 1 Den. C. C. 398; 18 L. J., M. C. 137; but that the court has no jurisdiction to hear a case stated from the court below on a judgment given on demurrer, for

the Court of Criminal Appeal has jurisdiction only after a conviction on trial by jury; *R. v. Faderman*, 1 Den. C. C. 565; 19 L. J., M. C. 147; nor *semble*, by Cresswell, J., has it power to amend an indictment, and so make the jury a party to the finding; *R. v. Harris, Dears.* C. C. 347.

When an amendment has been made by the court below, the Court for Crown Cases Reserved cannot consider the indictment as it originally stood. *R. v. Pritchard*, 1 L. & C. 34; *R. v. Webster*, 1 L. & C. 79.

Where the prisoner had pleaded guilty, and a case was reserved by the magistrates as to whether the act described in the depositions correspond with the indictment, it was held, that as there was no trial, this was not a point of law arising upon the trial, and that the court had therefore no jurisdiction. *R. v. Clark*, L. R., 1 C. C. R. 54; 36 L. J., M. C. 16.

In *R. v. Mellor, Dears. & B. C. C.* 468, the prisoner was found guilty of murder, and sentenced to death; the following day it was discovered that J. H. T. had been called as one of the jury to try the case, but that W. T., had, by mistake answered to that name and had been sworn by it. Wightman, J., respited execution, and reserved the point for the consideration of the court; seven judges out of fourteen who were present held that this was not a question of *law arising at the trial over which the court had jurisdiction. [*239 See *supra*, p. 216.

In this case it was doubted whether the court had power to order a *venire de novo*, but this power has been exercised in a case of misdemeanor. *R. v. Yeadon*, 1 L. & C. 81; 31 L. J., M. C. 70.

The statute was held to apply to points of law arising upon a trial under a special commission appointed under the repealed statute 9 Geo. 4, c. 31, s. 7. *R. v. Bernard*, 1 F. & F. 240.

With respect to the practice of the court, cases reserved should be submitted in a complete form; *R. v. Holloway*, 1 Den. C. C. 370; 18 L. J., M. C. 61; in which case the court refused to send back the case for amendment. The court will look at the indictment for the purpose of assisting their judgment, although it be not set out in the case; *R. v. Williams*, 2 Den. C. C. 61; 20 L. J., M. C. 106; but they will not consider an objection which has not been reserved, even though it be fairly deducible from the case itself, nor will they go into any matter of evidence which occurred at the trial, if it is not stated in the case; *R. v. Smith*, Temp. & M. 214; 14 Jur. 92. Where there are two judges of assize, and the one of them, who tries a criminal case, reserves a point for the consideration of the Court of Criminal Appeal, but dies before the case is stated, the other judge may state and sign the case; *R. v. Featherstone, Dears. C. C.* 369; 23 L. J., M. C. 127. The Court of Criminal Appeal has no power to order the costs of the prosecution incurred by the case being reserved. *R. v. Dolen, Dears. C. C.* 436; 24 L. J., M. C. 59; *R. v. Hornsea, Dears. C. C.* 291. But in *R. v. Cluderoy*, 3 C. & K. 205, Williams, J., held that he had power, under the

7 Geo. 4, c. 64, s. 22, *infra*, to allow the costs of the prosecution in such a case reserved. In *R. v. Lewis*, 1 Dears. & B. C. C. 227, this was confirmed, and Cockburn, C. J., said, "We think it would be convenient that the officer of this court should examine into costs incurred in this court; and although his certificate cannot, in law, bind the taxing officer below, yet we have no doubt those officers will accept and consider as binding the certificate of the experienced officer of this court."

The invariable practice of this court is for the defendant's counsel to begin. *R. v. Gate Fulford*, Dears. & B. C. C. 74.

Where a case reserved has been restated by order of the court, an application supported by affidavit to have it again restated will be refused. *R. v. Studd*, 4 W. R. 806.

By the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 16, amending the Act of 1873, 36 & 37 Vict. c. 66, power is given to alter or annul any rules of court for the time being in force. By Ord. 68, r. 1, nothing in those rules, save as expressly provided, is to affect the procedure or practice in criminal proceedings. And by section 19 it is enacted that, subject to the first schedule (of the Act) and any rules of court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act. By the interpretation clause, s. 100, of the Act of 1873, "Crown Cases Reserved" shall mean such questions of law reserved in criminal trials as are mentioned in the Act of the 11 & 12 Vict. c. 78; see also sect. 15 of the Act of 1881 *240] (44 & 45 Vict. c. 68, *ante*, p. 237), as to the constitution of the court. By sect. 47 of the Act of 1873, "the determination of any such question of law arising in criminal trials by the judges of the said High Court in manner aforesaid shall be final and without appeal, and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record as to which no question shall have been reserved for the consideration of the said judges under the 11 & 12 Vict. c. 78. See *R. v. Steele*, 2 Q. B. D. 37; 46 L. J., M. C. 1; *R. v. Fletcher*, 2 Q. B. D. 43; 46 L. J., M. C. 4.

5. COSTS.

Costs in cases of felony. At common law there was no provision for the payment of costs in criminal cases. By the 27 Geo. 2, c. 3, the 18 Geo. 3, c. 19, and the 58 Geo. 3, c. 70, provision was made for this purpose in cases of felony. By the 7 Geo. 4, c. 64, the above statutes are repealed; and by s. 22 the following provision is substituted, which provides equally for the payment of costs in all cases of felony:—"The court, before which any person shall be prosecuted or tried for

any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpoena to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall severally have incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bond fide* have attended the court in obedience to any such recognizance or subpoena, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall *bond fide* have incurred, by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpoena, *and also to compensate such person for trouble and loss of time, and the amount of expenses of attending before the examining magistrate or magistrates,* and the compensation for trouble and loss of time therein shall be ascertained by the certificate of such magistrate or magistrates granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned."

By 45 & 46 Vict. c. 55, s. 9, the costs of prosecutions for felonies or misdemeanors committed within the jurisdiction of the Admiralty are to be paid as if the offence had been committed within the county in which it is tried, or if tried at the Central Criminal Court, as if tried in the county of Middlesex.

By the 17 & 18 Vict. c. 104, s. 267, a similar power is given with *respect to offences committed by British seamen, ashore or [*241 afloat, in places out of her Majesty's dominions. Power to order payment of costs in all cases of felony is given to the High Court of Admiralty by the 7 Geo. 4, c. 64; see s. 22.

By the 19 Vict. c. 16, s. 13, the expenses of a prosecution removed into the Central Criminal Court under that act may be ordered by that court to be paid, in the same way as if that court were holden under a commission of oyer and terminer and gaol delivery for the county or place in which the indictment was found. By s. 25, when the trial at the Central Criminal Court is obtained by the crown, a sum not exceeding 20*l.* may be ordered by the Court of Queen's Bench, or by a judge in vacation, to be paid by the Treasury to the person charged with the offence, to defray the charges and expenses of the attendance of his witnesses. By s. 26, the Central Criminal

Court may order reimbursement to be made to any person tried before that court under the provisions of the act, and who shall be acquitted, "of such sum as shall appear to them to have been properly expended for such removal of the trial of such person."

Costs under the Prevention of Corrupt Practices Act, 1883 (46 & 47 Vict. c. 51), are regulated by section 57 of that act.

It has been much doubted whether under the 7 Geo. 4, c. 64, s. 22, upon which most of the other statutes depend, any costs can be awarded to a prosecutor or witness who had not been bound over or subpoenaed. Where, however, the prisoner had been apprehended under a bench warrant, and neither the prosecutor nor any of the witnesses were under recognizance to prosecute or to give evidence, and only one of the latter had been subpoenaed, Parke, B., at first thought he could only grant the costs of the witness who had been subpoenaed; but on the following day his lordship said that on comparing the words of the 7 Geo. 4, c. 64, s. 22, relating to felonies, with those of the subsequent section, relating to misdemeanors (s. 23), it appeared to him that the court had authority in prosecutions for felony to award the prosecutor his costs, even although he was not under any recognizance; and his lordship accordingly granted the costs of the prosecution generally, including those of the witnesses. *R. v. Butterwick*, 2 Moo. & R. 196. This section is extended by the 29 & 30 Vict. c. 52, to expenses incurred in attending before an examining magistrate, although the parties may not be bound over by recognizance or subpoena, and although no committal for trial may take place. But a person not bound over, and who is not the prosecutor, but who assists in getting up a prosecution, is not entitled to any costs. *R. v. Cook*, 1 F. & F. 389; *R. v. Yates*, 7 Cox, C. C. 361.

It seems that in general no costs will be allowed before the trial has taken place; as when it is postponed. *R. v. Hunter*, 3 C. & P. 591, 14 E. C. L. However, in a case of murder, which was postponed until the following assizes on the application of the prisoner, and in which the costs of the prosecution were very heavy, Alderson, B., made an order for their payment. *R. v. Bolam*, Newc. Spr. Ass. 1839, MS.; s. c. 2 Moo. & R. 192, where, however, the point is not reported. So where a trial of murder was postponed, as the prisoner had been removed to a lunatic asylum, Pollock, C. B., did not allow the costs; but at the next assizes, on an affidavit of the prisoner being in a hopeless state of insanity, Patteson, J., allowed the costs and bound over the witnesses. *Reg. v. Derryhouse*, 2 Cox, C. C. 446.

*242] *And where on an indictment for felony in administering noxious drugs to procure abortion, an essential witness was ill and the trial was postponed, costs were allowed by Lush, J., upon an affidavit by the prosecutor that he had paid 12*l.*, but that he was poor and quite unable to defray any further expenses. *Reg. v. Wilson*, 12 Cox, C. C. 622, and *Reg. v. Dooley*, in the note. By the 33 & 34 Vict. c. 23, s. 3, the court by which judgment is pronounced may condemn any person convicted of treason or felony to payment of the costs of the

prosecution, such payment to be made out of the moneys taken from the prisoner or to be enforced by the party in the usual way in which costs are enforced in civil actions; and see s. 4, as to compensation for injury to property, *ante*, p. 229. An order under this section is valid, notwithstanding that the prisoner was adjudged bankrupt between the arrest and the conviction. *R. v. Roberts*, L. R. 9 Q. B. 77; 43 L. J., M. C. 17. But it is doubtful whether the court could make the order where there was an act of bankruptcy before the arrest. As to "*costs of the accused*," see *post*.

Costs in cases of misdemeanor.¹ There is no general provision for the payment of costs in cases of misdemeanor, but in the case of nearly every misdemeanor of common occurrence it is specially provided for. By the 7 Geo. 4, c. 64, s. 23, it is enacted that "where any prosecutor or other person shall appear before any court, on *recognizance* or *subpoena*, to prosecute or give evidence against any person indicted for any assault with intent to commit felony—of any attempt to commit felony—of any riot—of any misdemeanor for receiving stolen property knowing the same to have been stolen—of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, or of any neglect or breach of duty as a peace officer—of any assault committed in pursuance of any conspiracy to raise the rate of wages—of knowingly and designedly obtaining any property by false pretences—of wilful and indecent exposure of the person—of wilful and corrupt perjury, or of subornation of perjury—every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have, *bona fide*, attended the court in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony. Extended by 29 & 30 Vict. c. 52, see *supra*.

¹ In Pennsylvania by statute, except in felonies, the grand jury when the bill is ignored, or the petit jury, on acquittal, shall decide whether the county or the prosecutor is to pay the costs. They may name as prosecutor some one else than the one named in the indictment. *Commonwealth v. Ream*, 1 County Ct. Rep. (Pa.) 33. They must name him. A finding by the petit jury that the prosecutor pay the costs is insufficient, and will not justify a sentence against one whom the prosecuting attorney had named in the indictment as prosecutor. *Clemens v. Commonwealth*, 7 Watts, (Pa.) 485. But the jury cannot select any one without notice or without his assent, and put the costs on him, for that would be to condemn him without trial or confession. *Commonwealth v. Jackson*, 1 County Ct. Rep. (Pa.) 38. Where there is nothing in the testimony to show that the prosecutor behaved improperly, or of malice, it is the duty of the court to set aside a verdict against the prosecutor for costs. *Guffy v. Commonwealth*, 2 Grant's Cases, (Pa.) 66. It is contrary to public policy to allow costs to be imposed on public officers. *Commonwealth v. Ream*, 1 County Ct. Rep. (Pa.) 33. Agents of the Society for the Prevention of Cruelty to Animals are peace officers, and as such should not have costs of prosecution imposed upon them. *Commonwealth v. Grim*, 1 County Ct. Rep. (Pa.) 40.

By the 14 & 15 Vict. c. 55, s. 2, the power of courts to allow expenses of prosecutions is extended to the following misdemeanors, namely, "unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years—unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her—conspiring to charge any person with any felony, or to indict any person of any felony—conspiring to commit any felony." Extended by 29 & 30 Vict. c. 52, see *supra*. The *243] *offence first mentioned is now a felony; it is now a misdemeanor to abuse a girl above twelve and under thirteen years. See *post*, "Rape." Probably it would be held that the court still has power to award costs.

By the 24 & 25 Vict. c. 100, s. 74, "where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence." By s. 75, "the court may, by warrant under hand and seal, order such sum as shall be so awarded, to be levied by distress and sale of goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease."

By the 24 & 25 Vict. c. 100 (Offences against the Person Act), s. 77, "the court, before whom any misdemeanor indictable under the provisions of this act shall be prosecuted and tried, may allow the costs of the prosecution in the same manner as in cases of felony, and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony."

It will be seen, therefore, that in the case of a prosecution for common assaults the costs cannot be granted by the court except as against the prisoner, under s. 74. See 1 Russ. on Cr., 5th ed., 90 (n).

If a person committing an indictable offence by night is apprehended under 14 & 15 Vict. c. 19, s. 11, and assaults the person who apprehends him, or any of that person's assistants, and is convicted of such assault under s. 12, the costs of the prosecution may be allowed as in cases of felony, under s. 14. (As to costs in cases of prosecutions by guardians for assaults, etc., see *post*, tit. "Assault.")

By the 24 & 25 Vict. c. 96 (the Larceny and Kindred Offences

Act), s. 121, a similar provision to the 24 & 25 Vict. c. 100, s. 77, is made with respect to indictable misdemeanors against that act.

By the 24 & 25 Vict. c. 97 (the Malicious Injury to Properties Act), s. 77, a similar provision is made with respect to indictable misdemeanors against that act.

By the 24 & 25 Vict. c. 98 (the Forgery Act), s. 54, a similar provision is made with respect to indictable misdemeanors against that act.

By the 24 & 25 Vict. c. 99 (Offences relating to the Coin), s. 42, in all prosecutions for any offence against this act in England, which shall be conducted under the direction of the solicitors of her majesty's treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England, which shall not be so conducted, it shall be lawful for such court, in case a conviction shall take place, but not * otherwise, to allow the expenses of the prosecution in like manner; and every [*244 order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

The payment of expenses of prosecutions for misdemeanors removed into the Central Criminal Court, under the 19 Vict. c. 16, are provided for by s. 13 of that act; *supra*, p. 241; see also ss. 25 and 26.

By the 17 & 18 Vict. c. 104, s. 267, the costs of prosecutions against British seamen for offences committed ashore or afloat in places out of her majesty's dominions may be ordered to be paid "as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England." See the next provision.

In prosecutions relating to highways, the court has power under 5 & 6 Will 4, c. 50, s. 98, to order the costs of the prosecution to be paid where the defence is frivolous. See *post*, tit. "Highways." The provisions are somewhat complicated, and are too long for insertion in this place. See Shelford on Highways, pp. 93, 158.

Under the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 17), "Where the prosecution of the bankrupt under this act is ordered by any court, then on the production of the order of the court, the expenses of the prosecution shall be allowed, paid, and borne as expenses for prosecutions for felony are allowed, paid, and borne."

Under the 34 & 35 Vict. c. 31 (The Trade Union Act, 1871), and by s. 12, subs. 5 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), the Court of Quarter Sessions may, on appeal from the Court of Summary Jurisdiction, "make such order as to costs to be paid by either party as the court thinks just."

Costs under the Corrupt Practices Act, 1883 (46 & 47 Vict. c. 51), are regulated by section 57 of that act.

In misdemeanors, the expenses of witnesses who have not been subpoenaed cannot be allowed. *R. v. Dunn*, 1 C. & K. 730, 47 E. C. L.¹

¹ Witness fees are not allowable both for attendance on the magistrate's hearing and also in court when in the same case, and on the same day; nor to a witness who is in court under arrest. *Commonwealth v. Lovett*, 2 County Ct. Rep. (Pa.) 375.

And it is very doubtful indeed whether the costs of a prosecutor, not bound over to prosecute, can be granted; *R. v. Jeyes*, 3 A. & E. 416, 30 E. C. L.; from which it would seem they cannot; and see *R. v. Butterwick*, *supra*, p. 241. But if the prosecutor's name be included in a subpoena, they may. *R. v. Sheering*, 7 C. & P. 440, 32 E. C. L.

In the case of misdemeanors not provided for by statute, if the defendant submits to a verdict on an understanding that he shall not be brought up for judgment, the prosecutor is not, without a special agreement, entitled to costs. *R. v. Rawson*, 9 B. & C. 598, 17 E. C. L.

As to the payment of costs on indictments removed into the Court of Queen's Bench by *certiorari*, see *Corner's Cr. Pr.*

As to costs upon postponement of trial, see *ante*, p. 241.

Costs of the accused By the 30 & 31 Vict. c. 35, s. 2, provision is made for the payment by the prosecutor of the costs of the accused in the case of certain vexatious indictments where he is acquitted. And by ss. 3, 5, witnesses for the accused may be allowed their expenses whenever they give material evidence in his favor (except as to character) in the opinion of the justice, and have been bound over by him. See the statute in the Appendix. As to the expenses at Winter Assizes, where the prisoner is tried in a different county to that in which he was apprehended, see Orders in Council, *245] *23d October, 1876. Weekly Notes, L. R., Nov. 4, 1876, passed under 39 & 40 Vict. c. 57.

Mode of payment by the treasurer of the county, etc. By the 7 Geo. 4, c. 64, s. 24, "Every order for payment to any prosecutor or other person as aforesaid shall be forthwith made out and delivered by the proper officer of the court unto such prosecutor, or other person, upon being paid for the same the sum of one shilling for the prosecutor, and sixpence for each other person, and no more, and except in the cases thereafter provided for, shall be made upon the treasurer of the county, riding or division in which the offence shall have been committed, or shall be supposed to have been committed, who is thereby authorized and required, upon the sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts."

The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, enacts (s. 12) that "it shall be lawful for any two of the said justices and judges of oyer and terminer and of gaol delivery, to order and direct the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled thereto, to be paid by the treasurer of the county in which the offence of any person prosecuted would have been tried but for this act; and that every such treasurer or some known agent shall attend the said justices and judges of oyer and terminer and gaol delivery during the sitting of the court to pay all such orders."

And with respect to places which do not contribute to the payment of any county rate, or which have no fund applicable to similar purposes, it is enacted by the 7 Geo. 4, c. 64, s. 25, "that all sums directed to be paid by virtue of this act, in respect of felonies and of such misdemeanors as aforesaid, committed or supposed to have been committed in such liberties, franchises, cities, towns, and places, shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes where there is such a rate or fund, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such liberties, franchises, cities, towns, and parishes, shall be paid out of the rate or fund for the relief of the poor of the parish, township, district, or precinct therein, where the offence was committed or supposed to have been committed, by the overseers or other officers having the collection or disbursement of such last-mentioned rate or fund, and the order of the court shall in every such case be directed to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require."

By 45 & 46 Vict. c. 50, s. 169, municipal corporations of a borough having a separate court of quarter sessions shall be liable to pay the costs and expenses attending the prosecution of any felony or of any offence whereof the costs are payable as in the case of a felony when committed or supposed to have been committed in the borough, and the order of the court for the payment thereof shall be directed to the treasurer of the borough."

Rewards for the apprehension of offenders. By the 7 Geo. 4, c. 64, *s. 28, "Where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a [*246 county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary, or felonious house-breaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen, every such court is hereby authorized and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable, and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time, in or towards such apprehension; and where any person shall appear to any court of sessions of the

peace, to have been active in or towards the apprehension of any party charged with receiving stolen property knowing the same to have been stolen, such court shall have power to order compensation to such persons, in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively." By the 14 & 15 Vict. c. 55, the power of the court of sessions in this particular is extended to all the offences mentioned in 7 Geo. 4, c. 64, s. 28, "which such sessions may have power to try," and "provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the court unto such person without fee or payment for the same."

It was held by Hullock, B., that the case of *sacrilege* was not included in the above section, not coming within the words *burglary* or *housebreaking*. *R. v. Robinson*, 2 Lewin, C. C. 129. And on the authority of this case, Bolland, B., refused a similar application, though both he and Parke, B., would otherwise have been disposed to put a different construction upon the statute. *Id.* But where a woman was indicted for an attempt to murder her child by suffocating it, Patteson, J., allowed the constable his extra expenses in apprehending the prisoner, being of opinion that the case was within the spirit and intention of the foregoing clause, though not within the words. *R. v. Durkin*, 2 Lew. C. C. 163. It has been held, however, by Maule, J., that a stealing from the person is not within the words "robbery on the person." *R. v. Thompson*, York Spr. Ass. 1845, MS. Under the word "exertions" in the above clause, Parke, B., ordered a prosecutor a gratuity of five pounds for his courage in apprehending the prisoner. *R. v. Womersly*, 2 Lew. C. C. 126.

By the stat. 7 Geo. 4, c. 64, s. 29, "Every order for payment to *247] *any person, in respect to such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of five shillings and no more; and the sheriff of the county for the time being is hereby authorized and required, upon sight of such order, forthwith to pay to such person, or to any one duly authorized on his or her behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the commissioners of his majesty's treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever."

Allowance to the widows and families of persons killed in endeavoring to apprehend offenders. By the 7 Geo. 4, c. 64, s. 30,

"If any man shall happen to be killed in endeavoring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned [in sect. 28], it shall be lawful for the court, before whom such person shall be tried, to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court, and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned" [in the 29th section].

*248]

*VENUE.

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14 & 15 Vict. c. 100, s. 23. In general the offence must on the face of the indictment appear to have been committed within the jurisdiction of the court before whom the prisoner is tried; and if it appear by the evidence that the venue of the offence, *i. e.*, the place where it was committed, is not the same as that mentioned in the indictment, the variance unamended would be fatal.¹

But the strictness of this rule has been modified in various ways, so that of late years but little attention has been paid to questions of venue; this and the number of provisions scattered through various acts of parliament relating to this subject render such questions, when they do arise, very difficult of solution.

Formerly it was necessary in the narrative of the offence itself to show the venue; now by the 14 & 15 Vict. c. 100, s. 23, it is enacted, that "it shall not be necessary to state any venue in the body of any indictment; but the county, city, or other jurisdiction named in the

¹ Proof that a body found in a river in the heart of a county was in a condition showing that it must have been thrown there, and had not drifted, warrants a finding that the homicide was committed in that county. *Commonwealth v. Costley*, 118 Mass. 1. On proof of venue. *Laydon v. State*, 52 Ind. 459; *Beavers v. State*, 58 Ind. 530; *State v. Dent*, 6 Rich. (S. C.) 333; *Franklin v. State*, 5 Baxter, (Tenn.) 613. Proof of venue is essential. *West v. State*, 21 Tex. App. 427; *Stazy v. State*, 58 Ind. 514; *People v. Torpey*, 59 Cal. 371; *State v. Inman*, 76 Mo. 548; *State v. McGinnis*, 74 Mo. 245. Whether a particular locality is or is not within a particular county is not a fact judicially known to the courts. *Boston v. State*, 5 Tex. App. 383. The doctrine of reasonable doubt does not apply to proof of venue. *Andrews v. State*, 21 Fla. 598. But see *Hoffman v. State*, 12 Tex. App. 406; *Gosha v. State*, 56 Ga. 36. Venue may be shown indirectly and circumstantially. *State v. Cantieny*, 34 Minn. 1. An indictment is not sustained unless there is proof that the offence was committed in the county therein laid; but strong presumption thereof, raised by the evidence, is sufficient. *Richardson v. Commonwealth*, 80 Va. 124. It is sufficient if the indictment alleges that the crime was committed at a place within the jurisdiction of the court. *People v. Buddensieck*, 4 N. Y. Crim. Rep. 230.

margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that, in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and, provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment, by way of venue."

By s. 24 of the same act, no indictment for any offence shall be held insufficient . . . for want of a proper or perfect venue. See the statute in the Appendix.

*By a previous section of the same statute, s. 1, *supra*, [*249 p. 209, power is given to the court in any indictment for felony or misdemeanor to amend a variance "in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in such indictment."

The effect of these provisions appears to be that only two objections are now of much importance with respect to the venue. First, that on the face of the record it appears that the court has no jurisdiction; secondly, that the evidence shows that the court has no jurisdiction. And even the first of these objections may sometimes be got over by an exercise of the above power of amendment.

If it appears upon the face of the record that the court has no jurisdiction a conviction cannot be sustained without amendment, notwithstanding that the court really had jurisdiction to try the offence. *R. v. Mitchell*, 2 Q. B. 636, 42 E. C. L.

Offences committed on the boundary of counties, or partly in one county and partly in another. By the 7 Geo. 4, c. 64, s. 12 (repealing 59 Geo. 3, c. 96), "where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein." The Irish statute, 9 Geo. 4, c. 54, contains an exactly similar enactment.

It has been held, that the section does not extend to trials in limited jurisdictions, but only to county trials. *R. v. Welsh*, 1 Moody, C. C. 175. Nor does it enable the prosecutor to lay the offence in one county and try it in another; but only to lay and try it in either. *R. v. Mitchell*, 2 Q. B. 636, 42 E. C. L. It applies to offences which are local in their nature, such as burglary, as well as to larcenies and other transitory felonies. *R. v. Ruck*, Hereford Spr. Ass. 1829; 2 Russ. Cri. 46, 5th ed. Questions frequently arise as to whether any material part of an offence has been committed in a

particular county where the trial is had, and instances will be found *post*, tits. "Embezzlement," "False Pretences," and "Larceny;" and see Index, "Venue."

Offences committed in detached parts of counties. By the 2 & 3 Vict. c. 82, s. 1, justices of the peace for any county may act as justices in all things relating to any detached part of any other county, which is surrounded in whole or in part by the county for which such justices act, and all offenders in such detached part may be committed for trial, tried, convicted, and sentenced, and judgment and execution may be had upon them, in like manner as if such detached part were to all intents and purposes part of the county for which such justices act.

By s. 2, the expenses of prosecuting offenders committed from the detached part of any county are to be repaid by the county to which such detached part belongs, in the manner therein prescribed.

It has been held that the grand jury for the county which wholly surrounds a detached part of another county, may find an indictment for an offence committed in such detached part, and that the prisoner *250] *may be tried by a jury of such surrounding county. The prisoner was indicted in Dorsetshire for larceny in a parish of Somersetshire, entirely detached from it, and surrounded in whole by Dorsetshire. He had been committed by a Dorsetshire magistrate to the gaol of that county. The indictment laid the offence to have been committed in the parish of H., the same being a detached part of the county of Somerset, surrounded in the whole by the county of Dorset; the venue in the margin was Dorset. The indictment did not state that the prisoner was in Dorsetshire, or that he was committed by a Dorsetshire magistrate. It was objected, first, that this should have appeared on the face of the indictment, and secondly, that the grand jury of Dorsetshire could not find the bill, as there were no words in the statute giving any power to find the bill; and the 60 Geo. 3, c. 4, the 7 Geo. 4, c. 64, s. 12, and the 4 & 5 Will. 4, c. 36, were referred to in order to show that the word "try" in a statute did not include the finding of a bill by the grand jury. Rolfe, B., however, overruled the objection, saying that it would strike the act out of the statute book. *R. v. Loader*, 1 Russ. Cri. 8, 5th ed.

Offences committed on persons or property in coaches employed on journeys, or in vessels employed in inland navigation. The 7 Geo. 4, c. 64, s. 13, for the more effectual prosecution of offences committed during journeys from place to place, enacts, "that where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, wagon, cart, or other carriage whatever, employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever, employed in any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county

through any part whereof such coach, wagon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties through or adjoining to or by the boundary of any part whereof such coach, wagon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county."

The Irish statute, 9 Geo. 4, c. 54, contains a similar enactment.

The offence must be committed "in or upon the coach," to bring it within the above act; therefore, where a guard of a coach, on changing horses near Penrith, carried a parcel to a privy, and while there, took two sovereigns from it; Parke, B., held that he must be tried in Westmoreland. *R. v. Sharpe*, 2 Lew. C. C. 233.

Offences committed in the county of a city or town corporate.

By the 38 Geo. 3, c. 52, a prosecutor may prefer his bill of indictment for any offence committed within the county of any city or town corporate, to the jury of the county next adjoining, and the offender may *be there tried in the same way as if the offence had been [251 committed in the county. Formerly the cities of London and Westminster, the borough of Southwark, and the cities of Bristol, Chester, and Exeter, were exempted from the operation of this act; but as to Bristol, Chester, and Exeter, the exception is repealed by the 45 & 46 Vict. c. 50, sched. 6.

Now, by the 14 & 15 Vict. c. 55, s. 19, "whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which her majesty has not been pleased for five years next before the passing of this act to direct a commission of oyer and terminer and gaol delivery to be executed, and until her majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed, within the same, shall commit to safe custody in the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this act, and the recognizances to appear to prosecute and give evidence taken by such justice, justices, or coroner, shall, in all such cases, be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county; and the justice, justices, or coroner, by whom persons charged as aforesaid may be committed, shall deliver or cause to be de-

livered to the proper officer of the court the several examinations, informations, evidence, recognizances, and inquisitions relative to such persons, at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice, or justices, or coroner having authority so to commit, and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer or general gaol delivery for such adjoining county, as in the case of persons charged with offences of the like nature committed within such county." By s. 24, "for the purposes of this act the counties named in the second column of schedule C. to the 5 & 6 Will. 4, c. 76, shall be considered next adjoining the counties of cities and towns corporate in the first column of the same schedule in conjunction with which they are respectively named." That is to say, Northumberland is the next adjoining county to Berwick-upon-Tweed and Newcastle-upon-Tyne; Gloucestershire to Bristol; Cheshire to Chester; Devonshire to Exeter; and Yorkshire to Kingston-upon-Hull. The same provision with respect to Hull and Newcastle is contained in the 38 Geo. 3, c. 52.

By the 14 & 15 Vict. c. 100, s. 23, "where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue." This is a very clumsy provision; probably what it means is, that the offence may be laid in the county corporate, and tried in the county adjoining; but that is exceedingly awkward, and it is better to follow the direction given in Arch. Pr. 10th ed., p. 24, and state it thus: "County of Chester (being the next adjoining county to the county of the city of Chester), to wit."

An important alteration has been made in the boundaries of some *counties by the Boundary Act, 2 & 3 Will. 4, c. 64, and the *252] Municipal Reform Act, 5 & 6 Will. 4, c. 76 (now repealed, 45 & 46 Vict. c. 50, and see section 228 of that act), so that if a felony be now committed in that part of the county of a town which has been added to it by the Boundary Act and the Municipal Reform Act, it is triable within the county of the town. The prisoner was indicted for wounding with intent to do grievous bodily harm. The offence was committed at a place which was added to the borough of Haverford-west, which is a county of itself by the Boundary Act, and declared by the Municipal Reform Act to be part of the borough, the place in question not having been within the borough before the passing of those acts. It was held by Coleridge, J., that the prisoner might be tried by a jury of the borough. *R. v. Piller*, 7 C. & P. 337, 32 E. C. L. In *R. v. The Just. of Gloucestershire*, 4 A. & E. 689, 31 E. C. L., it was held that the effect of these statutes was to transfer the jurisdiction entirely and for all purposes out of one county into the other.

Offences committed at sea—jurisdiction of the court of Admi-

ralty. The jurisdiction of the court of admiralty, according to Blackstone, extends to all crimes and offences committed either upon the sea or upon the coasts out of the body of any English county, 4 Black. Com. 268. But this definition is not accurate, for, on the one hand, the jurisdiction is expressly extended by 15 Rich. 2, c. 3, to death and mayhem happening in great ships being in the streams of great rivers, and so within the extent of a county. And on the other hand, there are certain parts of the sea which, as being *intra fauces terræ*, are considered as belonging to the adjoining counties and yet as to these the court of admiralty has a concurrent jurisdiction. Thus, where a murder was committed in Milford Haven, seven or eight miles from the river's mouth, and sixteen miles below any bridge across the river; the passage where the murder was committed was about three miles across, and the place itself about twenty-three feet deep, and never known to be dry but at very low tides. Sloops and cutters of one hundred tons were able to navigate where the body was found, and nearly opposite the place men-of-war were able to ride at anchor. The deputy vice-admiral of Pembrokeshire had of late employed his bailiff to execute process in that part of the haven. The judges were unanimously of opinion that the trial was rightly had at the admiralty sessions, though the place was within the body of the county of Pembroke, and the courts of common law had concurrent jurisdiction. During the discussion, the construction of the statute 28 Hen. 8, c. 15, by Lord Hale, was much preferred to the doctrine of Lord Coke in his Institutes (3 Inst. 111, 4 Inst. 134); and most, if not all the judges seemed to think that the common law had a concurrent jurisdiction in this haven, and in other havens, creeks, and rivers of this realm. *R. v. Bruce*, 2 Leach, 1093; *Russ. & Ry.* 243. See also *R. v. Cunningham*, 28 L. J., M. C. 66, a similar case.

With regard to the seashore, it is clear that the courts of common law and the court of admiralty have alternate jurisdiction between high and low water-mark. 3 Inst. 113.

Both the public and private vessels of every nation on the high seas and out of the territorial limits of any other state are subject to the jurisdiction of the state to which they belong. Every offence committed upon the high seas on board a British ship (as to what is *sufficient evidence to prove that a ship is a British ship, see [*253 *R. v. Bjornsen*, L. & C. 545; *R. v. S. von Seberg*; L. R. 1 C. C. R. 264; 39 L. J., M. C. 133; *Leary v. Lloyd*, 39 L. J., M. C. 194), whether by a subject of this country or a *foreigner*, is within the jurisdiction of the court of admiralty. *R. v. Lopez* and *R. v. Sattler*, Dears. & B. C. C. 525.

Whether or no at common law an offence committed on board a British ship within the dominions of a foreign state was cognizable in this country was thought doubtful, but it has been decided that even when such a ship is within foreign dominions, if it be where great ships go, it is in effect upon the high seas, and the Admiralty have jurisdiction. *R. v. Anderson*, L. R. 1 C. C. R. 161, 38 L. J., M. C. 12, the offence having been committed on the Garonne, a river "where great ships go."

In *R. v. Carr*, 10 Q. B. D. 76, 52 L. J., M. C. 12, it was attempted to distinguish the above case, on the ground that the basis of the decision was the fact that the person committing the offence was at the time a sailor serving on board the ship; but the court considered the distinction to be immaterial, holding the true principle to be that a person coming on board an English ship where the English law is reigning becomes entitled to our law's protection, and as a correlative becomes amenable to its jurisdiction. The vessel was in the river at Rotterdam, sixteen or eighteen miles from the sea. The place was one where large vessels usually lay, within the ebb and flow of the tide. The vessel lay alongside of the quay in the town, and was moored to the quay, but the crew was not discharged, nor was the ship under repair. See *per Pollock, B.*

By the 17 & 18 Vict. c. 104, s. 267, "all offences against property or person committed in or at any place, either ashore or afloat, out of her majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be inquired of, heard, tried, determined and adjudged in the same manner and by the same courts and in the same places as if such offence had been committed within the jurisdiction of the admiralty of England."

There seems no express decision as to whether the jurisdiction of the court of admiralty extends at common law to offences committed by British subjects on board foreign vessels on the high seas. But it seems very doubtful whether an offence committed within the territorial limits of a foreign country by a subject of this country is cognizable by any of our courts, *infra*, p. 257; and, as the foreign ship is in law a part of the territory of the country to which it belongs, offences committed on board her would seem to be equally excluded. In America, in the case of *The United States v. Wiltberger*, 5 Wheat. 76, it was held that no such jurisdiction exists in the courts of that country, though some American lawyers (see 1 Kent Comm. 363, n.; *R. v. Lopez, Dears. & B. C. C.* 530) seem still to think the case doubtful.

Whatever may be the case with respect to British subjects on board foreign vessels on the high seas, it is clear that foreign subjects upon foreign vessels on the high seas are not subject to our jurisdiction (see *R. v. Keyn, infra*), though they are so when they enter our English rivers, etc. *R. v. Cunningham, supra*, cited in judgment of Lindley, J., in *R. v. Keyn, infra*. It was sought to extend the *254] jurisdiction of the admiralty beyond the rivers, etc., to three miles below low water mark. The history of this claim has been traced by Cockburn, C. J., in his judgment in *R. v. Keyn* (*The Franconia*), 2 Ex. D. 63; 46 L. J., M. C. 17, 63, which may be very shortly stated as follows: The old English lawyers had asserted the sovereignty of England over the whole of the narrow seas; the jurists explained this claim to mean as far as cannon-shot on the maxim "*potestas finitur ubi finitur amorum vis*," which was further ex-

plained to mean three miles from low water mark, although neither the distance nor the degree of the jurisdiction were clearly defined. It was however agreed that for some distance and to some degree the sea was subject to the jurisdiction of the local state. Treaties spoke of such a jurisdiction in respect of fishing and of neutral rights during war and other such matters, and some statutes also alluded to the three-miles limit; but no instance is to be found of the adoption of such jurisdiction to the extent of making the criminal law applicable to foreigners in foreign ships passing within that limit. The legislature might perhaps, with the consent of other countries, assert a criminal jurisdiction over the three-miles limit, but at present the criminal law cannot reach a foreigner upon a foreign vessel upon the high seas.

This suggestion of the lord chief justice was adopted by the 41 & 42 Vict. c. 73. By that act, an indictable offence committed either by a British or foreign subject on the open sea within the three-miles limit, is within the jurisdiction of the admiral. In the case of a foreigner the certificate of the secretary of state to the effect that it is expedient that proceedings should be instituted must first be obtained.

The rule that the ship is part of the territory of the state to which she belongs ceases to operate as regards a private ship as soon as she enters the part of the sea which is *infra dominium* of any other sovereign. But public ships, even in a foreign port, are still considered as coming within the rule; so that offences on board these are offences against the municipal law of the country to which the ship belongs, and in this country such an offence would at common law be cognizable by the court of admiralty.

By engaging in piracy a person becomes *hostis humani generis*, and forfeits all claim to protection from his own country. Any country, therefore, may assume to punish him, whether he be a subject of that country or not, and wherever the offence is committed. In England this offence comes within the jurisdiction of the admiralty court.

As to offences against the customs, see tit. "Smuggling."

Offences committed within the jurisdiction of the Admiralty—where tried. These offences were originally tried in the court of the lord high admiral according to the forms of the civil law. But this mode of proceeding being found objectionable, it was provided by the 28 Hen. 8, c. 15, that all treasons, felonies, robberies, murders, and confederacies thereafter to be committed in or upon the sea, or in any other haven, river, creek or place where the admiral or admirals have, or pretend to have, power, authority or jurisdiction, shall be inquired, tried, heard, determined, and judged, in such shires, and places in the realm, as shall be limited by the king's commission or commissions to be directed for the same in the like form and *condition, as if such offence or offences had been committed or *255 done in or upon the land. Both Lord Eldon and Lord Stowell, however, considered that this statute had been allowed to become obsolete (Brown Adm. App. 3), and accordingly, by the 39 Geo. 3, c. 37, s. 1, it was provided that "all and every offence and offences

which, after the passing of that act, shall be committed upon the high seas, out of the body of any county of this realm shall be, and they are declared to be of the same nature respectively, and to be liable to the same punishment respectively, as if they had been committed upon the shore, and shall be inquired of, heard, tried and determined, and adjudged, in the same manner as treasons, felonies, murders, and confederacies are directed to be tried by the 28 Hen. 8, c. 15."

This mode of trying offences being found inconvenient, it was provided by the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 22, "that it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commission to be issued under the authority of this act or any two or more of them to inquire of, hear or determine any offence or offences committed, or alleged to have been committed on the high seas, or other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to, or detained therein for any offence or offences alleged to have been done or committed upon the high seas within the jurisdiction of the admiralty of England; and all indictments found and trials and other proceedings had and taken by and before the said justices and judges shall be valid and effectual to all intents and purposes whatsoever."

A more general provision was subsequently made by the 7 & 8 Vict. c. 2, which after reciting that the issuing of a special commission in the manner prescribed by the 28 Hen. 8, c. 15 was found inconvenient, enacts by s. 1, "that her majesty's judges of assize or others her majesty's commissioners, by whom any court shall be holden under any of her majesty's commissioners of oyer and terminer and general gaol delivery, shall have, severally and jointly, all powers which by any act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the admiralty of England, and to deliver the gaol within every county and franchise within the limits of their several commissions of any person committed or imprisoned therein for any offence alleged to have been committed on the high seas and other places within the jurisdiction of the admiralty of England; and all indictments found, and trials and other proceedings had by and before the said justices and commissioners shall be valid." By s. 2, "in all indictments preferred before the said justices and commissioners under this act the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts, which in other indictments would have been averred to have taken place in the county where the trial is had, shall in indictments preferred under this act be averred to have taken place on the high seas."

By 18 & 19 Vict. c. 91, s. 21, "if any person being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbor, or if any person not being a British subject, charged with

having committed any crime or offence on board any British ship on *the high seas, is found within the jurisdiction of any court of justice in her majesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case, as if such crime or offence had been committed within such limits." By the 30 & 31 Vict. c. 124, s. 11, if a British subject commits a crime on board a British ship or on board a foreign ship to which he does not belong, any court in the Queen's dominions which would have had cognizance of such crime if committed on board a British ship within the limits of the ordinary jurisdiction of such court, shall have jurisdiction to hear and determine the case as if the said crime had been committed as last aforesaid.

By the 24 & 25 Vict. c. 96 (the Larceny Act), s. 115, "all indictable offences mentioned in this act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence, or for being an accessory to any such offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed on the 'high seas;' provided that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces."

The prisoner having stolen goods in a British ship on the high seas was afterwards apprehended and tried in the borough of Southampton, and it was held under the above section he was rightly tried there. *R. v. Peel*, L. & C. 231; 32 L. J., M. C. 65.

The 24 & 25 Vict. c. 97 (malicious injuries to property), s. 72, contains precisely similar provisions; so also do the 24 & 25 Vict. c. 98 (forgery), s. 50; the 24 & 25 Vict. c. 99 (coinage), s. 36; and the 24 & 25 Vict. c. 100 (offences against the person), s. 68.

By the 24 & 25 Vict. c. 94, s. 9, "where any person shall, within the jurisdiction of the admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed 'on the high seas;' provided that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces."

Offences committed partly at sea and partly on land. It was formerly matter of great doubt, whether the killing of one who died on land of a wound received at sea could be inquired of either by the ordinary commissioners of oyer and terminer, or by the admiral; 1 East, P. C. 365. To take away this doubt, the 2 Geo. 2, c. 21, was passed, which was repealed by the 9 Geo. 4, c. 31. The latter statute *257] was again repealed, and by the 24 & 25 Vict. c. 100, s. 10, it is enacted that "where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been committed in that county or place."

This section would not apply to the case of a person standing on the shore and firing a loaded musket at a cutter on the high seas, which would be an offence committed entirely within the jurisdiction of the admiralty; *R. v. Coombe*, 1 Lea. C. C. 388; 1 East, P. C. 367; nor would it apply to the case of a foreigner feloniously struck by another foreigner on board a foreign ship, and dying on land in England, which is not an offence cognizable by our laws; *R. v. Lewis*, Dearsley & B. C. C. 182. These decisions are applicable to the present statute.

Offences committed abroad. It has already been said (*supra*, p. 253) that the question whether an offence committed by a British subject in a foreign country is to be considered as an offence against the laws of this country, is one of some difficulty. And this difficulty is greater with respect to offences committed on land than offences committed on board ship within foreign dominions, because over the latter, if they are offences against the laws of our country at all, the admiralty court would clearly have jurisdiction; but with respect to the former, it does not appear that any of the criminal courts in this country, all of which are limited to some part of the Queen's dominions, could claim jurisdiction over them, even if on general principles, they were cognizable here. Mr. Greaves thinks murder would be triable by the court of the constable and marshal, according to the forms of the civil law; Gr. Stat. of 24 & 25 Vict. p. 20.

Some information on this subject may be derived from the American cases which are collected in the first volume of Kent's Comm., but it must be borne in mind that it is fully settled that the criminal courts of that country have no common law jurisdiction but only such as is conferred upon them by the Acts of Congress.

It may also be borne in mind that no principle of international law

is in any way violated by the assumption of jurisdiction in these cases ; for, of course, the British tribunal does not presume to act until the party accused comes within the Queen's dominions, from which moment the question becomes one entirely of municipal law.

In the case of *R. v. Kohn*, a Prussian ship's carpenter, conspired at Ramsgate with certain other Prussians to scuttle a Prussian ship, either on the high seas or on the bar of Ramsgate harbor. The ship was scuttled on the high seas. Kohn, the ship's carpenter, was indicted for a conspiracy to cast away the ship with intent to defraud the underwriters, and also (in another count) for a conspiracy with *intent to defraud generally. The question left to the jury [*258 was whether it was agreed and consented to by and between the prisoner and any other person at Ramsgate, that the ship should be destroyed whether at sea or in port. As the conspiracy in this case was in the alternative, namely, to scuttle either on the high seas, or on the bar, it does not expressly decide the question, whether a conspiracy in England to injure on the high seas is a crime when all the parties are foreigners ; but, upon principle, it would seem that such a conspiracy ought to be criminal, for a conspiracy may be a crime, although the act proposed to be done is not in itself a crime, and thus a conspiracy between foreigners in England to injure a foreigner out of the jurisdiction might be a crime against the law of England, though the injury itself might not be under the jurisdiction of English law, and in that sense, not criminal. *R. v. Kohn*, 4 F. & F. 68.

To a certain extent the matter has been made the subject of legislation ; for the 17 & 18 Vict. c. 104, s. 267 (*supra*, p. 253), applies to offences ashore as well as afloat ; the 18 & 19 Vict. c. 91, s. 21 (*supra*, p. 255) applies to offences committed by British subjects in foreign ports ; and by the 9 Geo. 4, c. 31, s. 7, the sovereign was empowered to issue commissions to try persons charged in England with any murder or manslaughter, "committed on land out of the united kingdom, whether within the king's dominions or without." This statute is now repealed, and by the 24 & 25 Vict. c. 100, s. 9, it is enacted that "where any murder or manslaughter shall be committed on land out of the united kingdom, whether within the Queen's dominions or without, and whether the person killed was a subject of her majesty or not, every offence committed by any subject of her majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place ; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such persons might have been tried before the passing of this Act." As to s. 4 of the above act, see *R. v. Most*, *post*, tit. "Conspiracy."

As to the extradition of criminals, and the trial of criminals surrendered by foreign states in this country, see 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60; 44 & 45 Vict. c. 69. *Ex parte Bouvier*, 42 L. J., Q. B. 17, 12 Cox, C. C. Q. B. 303; *R. v. Weil*, 9 Q. B. D. 701.¹ As to the depositions taken in the foreign country, see 33 & 34 Vict. c. 52, s. 15, *ante*, p. 80.

Property feloniously taken in one part of the united kingdom and carried into another. By the 24 & 25 Vict. c. 96, s. 114, "If any person shall have in his possession in any one part of the united kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the united kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the united kingdom where he shall have such property, in the same manner as if he had actually stolen or taken it in that part; and if *259] any person in any one part of the united kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the united kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, and punished for such offence in that part of the united kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part."

See further as to this section, tit. "Receiving."

Venue and jurisdiction of the Central Criminal Court. By the 4 & 5 Will. 4, c. 36, s. 2, the jurisdiction of the Central Criminal Court extends over all offences committed within the city of London and county of Middlesex, and those parts of the counties of Essex, Kent, and Surrey, within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead, St. Mary Woodford, and Chingford, in the county of Essex; Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is within the said county of Kent, the liberty of Kidbrook, and the hamlet of Mottingham in the county of Kent; and the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, and that part of St. Paul Deptford which is within the said county of Surrey, Tooting, Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the clink liberty, and the district of Lambeth palace, in the county of Surrey.

¹ Extradition will not be ordered where the person accused was not in the State where the crime was committed, and is not a fugitive. Indictment for erecting unsound buildings, whereby people were injured. *Matter of Mitchell*, 4 N. Y. Crim. Rep. 596. The extradition of one charged with a crime exonerates his bail. *People v. Moore*, 4 N. Y. Crim. Rep. 205.

By s. 3, the district situated within the limits of the jurisdiction thereinbefore established is to be deemed one county for all purposes of venue, local description, trial, judgment, and execution not therein specially provided for; and in all indictments and presentments the venue laid in the margin shall be "Central Criminal Court, to wit," and all offences and material facts are to be laid to have been committed and averred to have taken place "within the jurisdiction of the said court;" and see also 9 & 10 Vict. c. 24.

Where an indictment for misdemeanor was preferred at the Central Criminal Court, and the marginal venue was "Central Criminal Court, to wit," and in the body of the indictment the facts were stated to have taken place "at the parish of St. Mary, Lambeth, Surrey, within the jurisdiction of the said court," and the indictment was removed by *certiorari*, it was held that the trial must be at the assizes for Surrey. *R. v. Connop*, 4 A. & E. 942, 31 E. C. L. See also, as to the venue of the Central Criminal Court, *R. v. Gregory*, 1 Cox, C. C. 198; 14 L. J., M. C. 82.

An indictment for misdemeanor found at the Central Criminal Court had in the margin the words, "Central Criminal Court," and stated that M. A., "late of the parish of *St. Stephen, Coleman-street*, in the city of *London*, and within the jurisdiction of the said court, laborer," intending, etc., on etc., "at the parish aforesaid, and within the jurisdiction," etc., unlawfully, etc.; alleging the offence without further statement of venue. The indictment was removed by *certiorari* and tried in London, and the defendant was convicted. On motion in arrest of judgment; *semble*, that the venue assigned to the material fact appeared sufficiently to be in the city of London; and *it was held, assuming this to be otherwise, that the defect was [*260 only want of a proper or perfect venue, and was cured by the 7 Geo. 4, c. 64, s. 20, for that the indictment showed jurisdiction in the court at *nisi prius* to try the case in London. *R. v. Albert*, 5 Q. B. 37, 48 E. C. L. An indictment was laid in the Central Criminal Court, the venue in the margin being, "Central Criminal Court, to wit," and the material facts being laid only as having taken place "within the jurisdiction of the said court." The defendant having removed it by *certiorari*, was tried at *nisi prius* in Middlesex and found guilty. The Court of Queen's Bench arrested the judgment, the description of place not being made sufficient by the 4 & 5 Will. 4, c. 36, s. 3, in cases not tried at the Central Criminal Court, and the defect not being cured by the 7 Geo. 4, c. 64, s. 20 (repealed), the *Nisi Prius* Court not appearing "by the indictment," "to have had jurisdiction over the offence." The court refused after verdict to enter a suggestion for a trial in Middlesex, *nunc pro tunc*. And *semble*, such an application would not be granted at any period. An indictment preferred in the Central Criminal Court should, with a view to the possibility of its removal, contain, besides the statutory venue, a venue of the county where the offence really took place. And if that has not been done, it should be made a condition of the removal by *certiorari* that the defendant consent to the insertion. *R. v. Stowell*, 5 Q.

B. 44, 48 E. C. L.; and see also *R. v. Gregory*, 7 Q. B. 274, 53 E. C. L.; *R. v. Hunt*, 10 Q. B. 925, 59 E. C. L.; 17 L. J., M. C. 14; and *R. v. Smythies*, 1 Den. C. C. R. 498; 19 L. J., M. C. 31. On an indictment found by the grand jury of the Central Criminal Court for perjury committed in London, within the jurisdiction of the Central Criminal Court, and which was afterwards removed by *certiorari* into the Queen's Bench at Westminster, and Middlesex was specified in the *certiorari* as the county in which the indictment should be tried, and the jury were taken from that county, it was held that the Court of Queen's Bench in Westminster had a discretion to name in the *certiorari* the county or jurisdiction in which the trial was to take place, and that by the jurors summoned from that jurisdiction, the same issues could be tried that would have been tried in London in the Central Criminal Court, had the indictment not been removed. *R. v. Castro*, 6 Ap. Ca. 229; 50 L. J. (H. L.) 497. By the 19 & 20 Vict. c. 16, the Court of Queen's Bench has power to order certain offenders, against whom indictments have been found for felonies or misdemeanors committed out of the jurisdiction of the Central Criminal Court, and which indictments have been removed by *certiorari*, to be tried at the Central Criminal Court. By 46 & 47 Vict. c. 51, s. 50, indictments for offences under the Corrupt Practices Prevention Acts, may, under certain circumstances, be tried at the Central Criminal Court. For other cases of venue in particular offences, see index, tit. "Venue."

Change of venue. When a fair and impartial trial cannot be had in the county where the venue is laid, the Court of King's Bench (the indictment being removed thither by *certiorari*, *ante*, p. 196), will, upon an affidavit stating that fact, permit a suggestion to be entered on the record, so that the trial may be had in an adjacent county. Good ground must be stated in the affidavit, for the belief that a fair trial cannot be had. *R. v. Clendon*, 2 Str. 911; *R. v. Harris*, 3 Burr. 1330; 1 W. Bl. 378.¹ This suggestion need not state the facts from which the inference is drawn, that a fair trial cannot be had. *R. v. *261* *Hunt*, 3 B. & A. 444, 5 E. C. L. This suggestion when entered is not traversable. 1 Chitty Crim. Law, 201. And the venue in the indictment remains the same, the place of trial alone being changed. *Id.* In *R. v. Casey*, 13 Cox, C. C. R. (Irish) 614, which was a case of libel, the Court of Crown Cases reserved, appear to have been of opinion that the venue in a criminal case will not be changed, but in two subsequent cases of murder the Court of Queen's Bench in Ireland changed the venue on the ground that an impartial

¹ *People v. Sammis*, 6 Thomp. & C. (N. Y.) 328. Change of venue is in the discretion of the court. *People v. Perdue*, 49 Cal. 425; *Dulany v. State*, 45 Md. 99. It is proper to be made when reasonable and claimed in good faith. *Johnson v. Commonwealth*, 82 Ky. 116. The convenience of witnesses should be considered. *Hall v. Central Pacific R. R. Co.*, 49 Cal. 454. Any step taken by the defendant in the new venue is a waiver of defects. *Flagg v. Roberts*, 67 Ill. 485. In objecting to a change of venue, the proper practice is to move to remand. *Johnson v. Von Kettler*, 66 Ill. 63. An agreement to a change of venue to be tried at the next term, does not estop a claim for continuance. *St. Louis L. & R. Co. v. Teters*, 68 Ill. 144.

trial could not be had, and no reference seems to have been made to the previous case. *R. v. McEneaney*, 14 Cox, C. C. 87; *R. v. Walter*, Id. 579. It is only, however, in case of misdemeanor that the Court of King's Bench will, in general, award a *venire* to try in a foreign country, though cases may occur in which the court would change the venue in felony. *R. v. Holden*, 5 B. & Ad. 347, 27 E. C. L.; 2 Nev. & M. 167. And even in cases of misdemeanor, the court has not exercised its discretionary power, unless there has been some peculiar reason which made the case almost one of necessity. Id. Upon an indictment for a misdemeanor, the application to change the venue ought to be made before issue joined. *R. v. Forbes*, 2 Dowl. P. C. 440.¹

As to removing indictments into the Central Criminal Court, see 19 & 20 Vict. c. 16, *supra*.

¹ It is too late after the jury are sworn. *People v. Cotta*, 49 Cal. 169.

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*APPREHENSION OF OFFENDERS.

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By private persons at common law. At common law all private persons are justified, without a warrant, in apprehending and detaining until they can be carried before a magistrate all persons found committing or attempting to commit a felony. *R. v. Hunt*, 1 Moo. C. C. 93.¹

But in cases of suspicion of felony, and in cases of offences less than felony, a private person has at common law no right to apprehend offenders. *Fost.* 318. Whether or not a private person may arrest a person who stands *indicted* for felony, does not appear to be well settled. Lord Hale inclines to the opinion that the protection does not extend to a private person in such case, because a person innocent may be indicted, and because there is another way of bringing him to answer, viz., process of *capias* to the sheriff, who is a known responsible officer. 2 Hale, P. C. 84. The reasoning of Mr. East, however, is rather in favor of the protection. It may be urged, he observes, that if the fact of the indictment found against the party be known to those who endeavor to arrest him, in order to bring him to justice, it cannot be truly said, that they act upon their own private suspicion or authority, and therefore they ought to have equal protection with the ordinary ministers of the law. At any rate, it is a good cause of arrest by private persons if it may be made without the death of the felon. (*Dalton*, c. 170, s. 5.) And if the fact of the prisoner's guilt be necessary for their complete justification, the bill of indictment found by the grand jury would (he conceives) for that purpose, be *prima facie* evidence of the fact, till the contrary should be proved. 1 East, P. C. 300.

Where a breach of the peace is actually being committed any private person may interfere to prevent it, even though no felony be committed or attempted, after proper warning, and calling upon the parties to desist. *Fost.* 272, 311. And as they may take all necessary measures to end the breach and to prevent its recurrence, they may apprehend and detain any persons taking part in the disturbance. Whether or no, when all danger of any further breach is over, no felony having been committed, they are bound to set at liberty the persons in their custody, or whether they may take them before a magistrate, or give them into the custody of a peace officer, does not appear to have been discussed.

¹ *Kennedy v. State*, 107 Ind. 144.

It is said by Hawkins that at common law every private person may arrest any suspicious night walker, and detain him till he give a good account of himself. Hawk. P. C. b. 2, c. 13, s. 6. But this *would be an authority even more general than that of peace officers (*infra*, p. 264), and the passage is not law. See 1 Rus. [*263 on Cri. 5th ed. 726.

By private persons by statute. By the 24 & 25 Vict. c. 96 (larceny), s. 103, "Any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person and forthwith taken, together with such property, if any, before some neighboring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence punishable either by indictment or by summary conviction, by virtue of this act, shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law."

By the 24 & 25 Vict. c. 99 (coinage), s. 31, "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence against this act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed, as soon as reasonably may be, before a justice of the peace, or some other proper officer, to be dealt with according to law."

By the 24 & 25 Vict. c. 97 (injuries to property), s. 61, "Any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighboring justice of the peace to be dealt with according to law."

By the 14 & 15 Vict. c. 19, s. 11, "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of peace, to be dealt with according to law."

So also in the Rural Police Act, 10 & 11 Vict. c. 89, s. 15 (*infra*, p. 264), persons found committing offences against that act

may be apprehended by the owner of the property, on or in respect to which the offence is committed, or his servant, or any person authorized by him.

By 9 Geo. 4, c. 69, s. 2, owners and occupiers of land and their gamekeepers, etc., have power to arrest persons committing offences under that act. See the section, *post*, tit. "Game."

By peace officer without warrant at common law. The power of a *264] *peace officer to apprehend and detain offenders is much greater than that of private persons. For they may exercise all the powers of the latter, and their right to apprehend persons indicted for felony is undoubted. 1 East, P. C. 298, 300. And they may, which private persons cannot do, apprehend persons *on a reasonable suspicion* of felony. *Samuel v. Payne*, Dougl. 359; 1 East, P. C. 301; 2 Hale, P. C. 83, 84, 89. Although no felony has been committed, *Beckwith v. Philby*, 6 B. & C. 635, 13 E. C. L.

What is a reasonable suspicion of felony cannot, of course, be stated with precision. But it has always been considered that a charge of felony by a person not manifestly unworthy of credit, is sufficient to justify the apprehension. 1 East, P. C. 302. The peace officer should also make such inquiries as his experience teaches him are best suited to ascertain the nature of the offence, and there are few that are without special directions how to act in such cases. In cases of misdemeanors a warrant must be procured and produced if required. See *Codd v. Cabe*, 1 Ex. D. 352; 45 L. J., M. C., 101; *post*, tit. "Murder."

Whether a constable or other peace officer is warranted in arresting a person after a breach of the peace has been committed, is a point which has occasioned some doubt. There are, indeed, some authorities, to the effect that the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice, to find security for his appearance. 2 Hale, P. C. 90; *Hancock v. Sandham*, *Williams v. Dempsey*, 1 East, P. C. 306 (n). But the better opinion was always said to be the other way. 1 East, P. C. 305; Hawk. b. 2, c. 12, s. 20; 1 Russ. on Cri. 5th ed. 394, 724. See *Timothy v. Simpson*, 1 C. M. & R. 757; *R. v. Carey*, 14 Cox, C. C. 214. And it was so expressly decided in *R. v. Walker*, 1 Dears. C. C. R. 358; 23 L. J., M. C. 123; there the prisoner had assaulted a police constable, who went away, and after two hours' time returned and took him into custody; the court held, that this was an unlawful apprehension. Pollock, C. B., said, "The assault for which the prisoner might have been apprehended was committed some time before, and there was no continued pursuit. The interference of the officer, therefore, was not for the purpose of preventing an affray, or of arresting a person whom he had seen recently committing an assault. The apprehension was so disconnected from the offence as to render it unlawful." A police constable having been struck by the prisoner went for assistance, and after an interval of an hour returned with three other constables, when he found the prisoner at home and the

door closed ; and after another interval the constables forced the door open and endeavored to apprehend the prisoner, who resisted and wounded the prosecutor, but was at last apprehended. The court held, that as there was no danger of any renewal of the original disturbance, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal. *R. v. Marsden*, L. R. 1 C. C. R. 131, 37 L. J., M. C. 80.

In *R. v. Light, Dears, & B. C. C. 332*, the defendant was convicted on an indictment charging him with assaulting a constable in the execution of his duty. It appeared that the constable, whilst standing outside of the defendant's house, saw him take up a shovel, and hold it in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside I would split your head open." About twenty minutes after the *defendant left the house, saying that he would leave his house [265 altogether, and he was then taken into custody by the policeman, who had no warrant. It was on this apprehension that the assault took place, and it was held that the policeman was justified under the circumstances in apprehending the defendant, and that the conviction was right. The court, no doubt, in this case, were strongly actuated by the feeling that the policeman, as always happens on such occasions, is placed in a very difficult position. When a man has recently committed an act of violence, the court might very well be extremely unwilling to say that in no view could the peace officer reasonably believe that he was about to commit another similar act, and so be justified in apprehending him. Much, in such a case, ought to be presumed in favor of an officer of justice, and it is a point upon which the opinion of the jury might be very properly taken. See *Baynes v. Brewster*, 11 L. J., M. C. 5, which is in accordance with this view.

By peace officer without warrant by statute. By the 24 & 25 Vict. c. 96 (larceny), s. 104, "Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying and loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit any felony against this act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law."

Similar provisions are contained in the 24 & 25 Vict. c. 97 (injuries to property), s. 57, and the 24 & 25 Vict. c. 100 (offences against the person), s. 66.

A policeman acting under these sections may be asked generally whether he had cause to suspect a person whom he had arrested, in order to show that the arrest was in execution of the constable's duty, but he cannot be asked in his examination in chief what were the particular grounds upon which his suspicion was founded when they did not form part of the transaction itself. *R. v. Tuberfield*, L. & C. 495; 34 L. J., M. C. 20; and *ante*, p. 103.

By the Metropolitan Police Act, 10 Geo. 4, c. 44, s. 7, it is enacted

"that it shall be lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil design."¹

By the Metropolitan Police Act, the 2 & 3 Vict. c. 47, s. 65, "it shall be lawful for any constable belonging to the metropolitan police force to take into custody, without warrant, any person who, within the limits of the metropolitan police district, shall be charged by any other person with committing any aggravated assault, in every case in which such constable shall have good reason to believe that such assault has been committed, *although not within the view of such constable*, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender." See also ss. 54, 64, and 66 of the same statute.

So by the Rural Police Act, 10 & 11 Vict. c. 89, s. 15, "any person found committing any offence punishable either upon indictment, or as a misdemeanor upon summary conviction, by virtue of this or the special act, may be taken into custody, without a warrant, by *266] any of the said constables, or may be apprehended by the owner of the property on or with respect to which the offence is committed, or by his servant or any person authorized by him, and may be detained until he can be delivered into the custody of a constable; and the person so arrested shall be taken, as soon as conveniently may be, before some justice to be examined and dealt with according to law: provided always, that no person arrested under the powers of this or the special act shall be detained in custody by any constable or other officer, without the order of some justice, longer than shall be necessary for bringing him before a justice, or than forty hours at the utmost."

By the 27 & 28 Vict. c. 47, which contains provisions as to licences to be granted to convicts, it is provided (s. 6), that any constable or police officer may without warrant take into custody any holder of such licence "whom he may reasonably suspect of having committed any offence, or having broken any of the conditions of his licence, and may detain him in custody until he can be taken before a justice of the peace or other competent magistrate, and dealt with according to law."

By the 34 & 35 Vict. c. 112, ss. 3, 7, the "Prevention of Crimes Act," a constable may apprehend without warrant a convict who appears to him to be getting his living by dishonest means, or who is guilty of any offence under s. 7.

As to the absence or invalidity of a warrant affording ground of defence, see tit. "Murder."²

¹ An officer is not guilty of an assault, if in good faith he arrests a man whom he believes to be drunk, unless he uses unnecessary force. That the man was convicted of drunkenness, is not conclusive. He can prove he was not. *Commonwealth v. Cheney*, 8 Crim. Law Mag. 9. In a civil action, the officer is liable if the man is not drunk. *Phillips v. Fadden*, 125 Mass. 198.

² Where a statute authorizes an officer to arrest without a warrant it is murder if the person arrested kill him in resisting the arrest. *Ballard v. State*, 43 Ohio, 340. But in cases where a warrant is necessary, it must be in the actual possession of the officer, who must show it upon demand. It is not sufficient that it has been issued. *People v. Shanley*, 4 N. Y. Crim. Rep. 472.

*EVIDENCE IN PARTICULAR PROSECUTIONS. [*267

ABDUCTION OF WOMEN AND CHILDREN.

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At common law. It seems very doubtful how far abduction was in any case, an offence at common law. Of course, if the woman did not consent, there would be an assault upon *her*: if she consented, but those having lawful charge of her resisted, and force were used, there would be an assault upon *them*. A conspiracy also to seduce would be an offence at common law, or to induce an unchaste woman to become a prostitute. *R. v. Howell*, 4 F. & F. 160. All the authorities usually quoted to show that this is an offence at common law, may be explained on one or other of these grounds.¹ See *R. v.*

¹ Procuring the intoxication of a sailor with the design of getting him on ship-board without his consent, and taking him on board in that condition, is kidnapping. *Hadden v. People*, 25 N. Y. 373. S.

An indictment for seducing an unmarried female, must allege and prove that such female was of previous chaste character. Such proof may be shown *prima facie* by presumption from other facts. *People v. Roderigas*, 49 Cal. 9. The prior unchastity of the prosecutrix may be shown by the defence. *State v. Patterson*, 88 Mo. 88. Overruling *State v. Brassfield*, 81 Mo. 151. Where an indictment charges two offences the State need not elect. But when the prosecutrix has testified to the first, she is incompetent to prove the second, since her evidence shows that when it was committed she was no longer chaste. *Cook v. People*, 2 Thomp. & C. 404. Where the offence charged is the last of several similar acts, the jury may consider them as the elements of one wrong. *Haymond v. Saucer*, 84 Ind. 3. On evidence to impeach the chastity of the female. *White v. Murtland*, 71 Ill. 250; *Love v. Masoner*, 6 Baxter, (Tenn.) 24. On the evidence necessary to sustain an action for seduction. *Wood v. State*, 48 Ga. 192; *Wilson v. State*, 58 Ga. 358. Proof that after the alleged seduction the female has had illicit intercourse with another is inadmissible. *Boyce v. People*, 55 N. Y. 644. See under Michigan statute as to evidence to impeach chastity of the woman. *People v. Brewer*, 27 Mich. 134. Where after a prior act of unchastity a woman reforms she regains the protection of the statute, unless the repetitions are frequent and the intervals of reformation short. *People v. Clark*, 33 Mich. 112. Under Indiana statute the pecuniary circumstances of the woman is admissible on the question of compensatory damages. *Wilson v. Shepper*, 86 Ind. 275. See *White v. Murtland*, 71 Ill. 250. Also that the married life of the woman was un-

Lord Grey, 3 S. Tr. 519; *R. v. Mears*, 2 Den. C. C. 79; 1 East, P. C. 460; 1 Russ. by Gr. 401; Hawk. P. C. b. 1, c. 41, s. 8.

By statute. The various statutes formerly directed against this offence were the 3 Hen. 7, c. 2; 29 Eliz. c. 9; 4 & 5 P. & M. c. 8; 1 Geo. 4, c. 115, and the 9 Geo. 4, c. 31. All these statutes are now repealed, and the provisions relating to the offence are contained in the 24 & 25 Vict. c. 100.

Abduction of a woman against her will from motives of lucre. By section 53, "where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent in any real or personal estate, or shall be a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her *268] *to be married or carnally known by any other person, shall be guilty of felony." For the punishment, see the next provision.

Abduction of a girl under age against the will of her guardian. By the same section, "Whosoever shall fraudulently allure, take away or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

Offender incapable of taking property. By the same section, "Whosoever shall be convicted of any offence against this section, shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall

happy, in an action *crim. con.* *Dance v. McBride*, 43 Iowa, 624; *Hadley v. Heywood*, 121 Mass. 236. Seduction under a promise of marriage is a statutory offence. Consent must have been given in consideration of the promise. Evidence on the part of the people that the prisoner subsequent to the seduction had refused to marry the prosecutrix is inadmissible. *Cook v. People*, 2 Thomp. & C. 404. The promise of marriage need not be in any set form. *State v. Brinkhaus*, 34 Minn. 285. An indictment for seduction need not state the facts constituting the seduction. *State v. Conkright*, 58 Iowa, 338. But the indictment must allege a seduction, not merely an illicit connection. *Commonwealth v. Schull*, 1 County Ct. R. (Pa.) 52. See *Rice v. Commonwealth*, 100 Pa. St. 28; *Commonwealth v. Bierce*, 27 Conn. 319; *West v. State*, 1 Wis. 193. Evidence of an abortion consequent on the seduction, if said abortion is averred in the declaration, may be introduced at the trial. *White v. Murtland*, 71 Ill. 250. The fact that the defendant offered to marry the woman after the action was brought is immaterial. *White v. Murtland*, 71 Ill. 250. Seduction is a higher offence than adultery or fornication. Under an indictment for the former the jury may find the defendant guilty of the latter. *Wood v. State*, 48 Ga. 192; *Rice v. Commonwealth*, 102 Pa. St. 408.

have any such interest, or which shall come to her as such heiress, co-heiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the Attorney-General appoint."

Taking away a woman by force, with intent to marry or carnally know her. By section 54, "Whosoever shall by force take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three [now five] years, or be imprisoned for any term not exceeding two years, with or without hard labor."

Abduction of a girl under sixteen years of age. By section 55, "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."¹

Taking or enticing away children under fourteen years of age. By section 56, "Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbor any such child, knowing the same to have been by force or fraud led, *taken, decoyed, enticed away or detained as in this section before mentioned, shall be guilty of felony, and being convicted [*269 thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three [now five] years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping; provided that no person who shall have claimed any right to the possession of such child, or shall be the mother, or shall have claimed to be the father of an illegitimate child shall be liable to be prosecuted by virtue hereof

¹ One who forcibly assists a mother to remove an infant child from one to whom the father has intrusted it, is criminally liable for assault and battery. *State v. Barney*, 14 R. I. 62. In an indictment for abducting a female under the statutory age the question of her chaste character is immaterial. *People v. Stott* 4, N. Y. Crim. Rep. 306.

on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof."

What constitutes a taking or detaining. There are so many different kinds of taking and detaining mentioned in the statute, that it is necessary to attend very carefully to the words used. The first part of s. 53 says, whoever shall "take away or detain against her will;" s. 54 says, whosoever shall "*by force* take away or detain against her will;" but the words "by force" can hardly make any difference.

Even under the old statute of Hen. 7, which did not contain the words "or detain," detaining a person who originally came with her own consent, was considered to be within the statute. *R. v. Brown*, 1 Ventr. 243; *Hawk. P. C. b. 1, c. 41, s. 7*; 1 *East, P. C. 454*; 1 *Russ. on Cri., 5th ed., 884*.

In the latter part of s. 53, the words are, "whosoever shall fraudulently allure, take or detain such woman out of the possession and against the will of her father or mother." It is clear that these words are intended to include the case of a woman herself consenting. They are taken from a repealed statute which formerly related to Ireland only (10 Geo. 4, c. 34, s. 23). The decisions on ss. 55 and 56 may perhaps throw some light on their meaning.

In s. 55, which applies to girls under sixteen years of age, the words are, "whosoever shall take or cause to be taken out of the possession and against the will of her father or mother, etc." Here also any violation of the girl's will is unnecessary. Thus it is said by Herbert, C. J., that the statute of 4 & 5 P. & M., which was to the same effect, was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises or gifts, and married in a secret way to their disparagement. *Hicks v. Gore*, 3 Mod. 84. So upon the same statute it was held that it is no excuse that the defendant, being related to the girl's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover to induce the girl secretly to elope and marry him, if it appear that it was against the consent of the father. *R. v. Twistleton*, 1 Lev. 257; 1 Sid. 387; 2 Keb. 432; *Hawk. P. C. b. 1, c. 41, s. 10*; 1 *Russ. on Cri., 5th ed., 892*. If the same latitude of construction were applied to s. 53, which relates to women of any age, it might be rather dangerous. It has been argued that, though by the statute a taking by force is not necessary, still that a person cannot in any sense be said to be *taken* who goes willingly, and that the word *take* in itself imports the use of some coercion. But this view has not been adopted; thus where A. went in the night to the house of B. and placed a ladder against the window, and held it for F., the daughter of B., to descend, which she did, and then eloped *270] *with A.*; F. being a girl fifteen years old; this was held to be a "taking" of F. out of the possession of her father within the statute, although F. had herself proposed to A. to bring the ladder and elope with him. *R. v. Robins*, 1 C. & K. 456, 47 E. C. L.

So in *R. v. Mankletow*, 1 Dears. C. C. R. 159; 22 L. J., M. C. 115, where the prisoner intending to emigrate to America, had privately persuaded a girl between twelve and thirteen years of age to go with him, and on the morning of his departure had secretly told her to put up her things in a bundle and meet him at a certain spot, and she accordingly left her father's house and met the prisoner, and the two traveled up to London together; this was held to be a "taking." *Jervis*, C. J., in delivering judgment in this case, said: "There are two points in this case. The first turns on the construction of the word 'take' in the statute. It is contended for the prisoner that the word 'take' must mean taking by force, actual or constructive. But a comparison of the section shows that that is not necessary. It is unimportant under the section on which this indictment was framed whether the girl consented or not to go away with the man. There can be no question upon the facts stated in this case, that when the prisoner met the girl at the appointed place, there was then a taking of her. The statute was framed for the protection of parents," and see *R. v. Booth*, 12 Cox, C. C. 231. In *R. v. Handley*, 1 F. & F. 648, *Wightman*, J., said, "a taking by force is not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's home. If, however, the going away was entirely voluntary on the part of the girl, the prisoner would not be guilty of any offence under the statute;" see, too, *R. v. Rob*, 4 F. & F. 59.

A man is not, it seems, bound to return a girl under sixteen to her father's custody, when she has left home without any inducement and come to him. If, however, he has ever held out any inducement to her to leave, and if, when she has left, he avails himself of her having left to induce her to continue out of her father's custody, this is within the statute, whatever his wishes may have been as to the particular time of her leaving. *R. v. Olifer*, 10 Cox, C. C. 402.

From what was said by *Parke*, B., in *R. v. Mankletow*, it would seem that the case of *R. v. Meadows*, 1 C. & K. 399, 47 E. C. L., cannot be relied on for any useful purpose.

In *R. v. Timmins*, 30 L. J., M. C. 45, the prisoner induced a girl of fourteen years and a half old to leave her father's house, and cohabited with her for three days, and then told her to go home. The jury found the prisoner guilty generally, but also found that he did not intend, when he took away the girl, to keep her away from home permanently. The Court of Criminal Appeal confirmed the conviction, but seemed anxious to limit their decision to the particular circumstances of this case.

The possession of father, mother, etc. A similar difficulty has been suggested on this point, namely, that where the girl leaves the house of the person, in whose custody she is, of her own accord, the offence cannot be committed, because the words of the statute are, "take out of the possession," and it is urged that if taken at all in this case, she is not taken out of the possession of her father, etc. But in *R. v.*

Mankletow, *ubi supra*, the court held that an actual possession of the *271] *father or other person was not necessary; and that though the girl may leave home of her own accord, still that possession continues in law until put an end to by the accused taking the girl into his own possession. Maule, J., seems to have ruled in the same way in a case of *R. v. Kipps*, 4 Cox, C. C. 167. In *R. v. Green and Bates*, 3 F. & F. 274, the prisoners found the girl in the street by herself and invited her to go with them, giving her drink which made her dizzy. Green then had intercourse with her in an empty house, where he kept her with him all night. Martin, B., directed an acquittal on the ground that the girl was not taken out of the possession of anyone. It must, however, be observed that in this case no evidence appears to have been given as to the purpose for which the girl had left home. In *R. v. Olifier*, 10 Cox, C. C. 402, Bramwell, B., ruled that when a girl leaves her father of her own accord without any inducement on the man's part the man is not bound to restore her to her father. But it seems there must be no intention to return on her part, for if there be an intention to return the girl is still in the constructive custody of her father. *Per Willes, J., R. v. Mycock*, 12 Cox, C. C. 28. In *R. v. Mankletow, supra*, Jervis, C. J., said, "A manual possession is not necessary. If the girl were a member of the family, and under the father's control, there is a sufficient possession. If a girl leaves her father's house for a particular purpose, with his sanction, she cannot legally be said to be out of her father's possession."

Where a girl lived with her father, and left home to go to a Sunday school, and the prisoner met her and seduced her and then brought her back, not knowing who she was or whether she had a father, but not believing she was a girl of the town; it was held that, as there was no evidence to show that the prisoner had reason to know that the girl was under her father's protection, the conviction was wrong. *R. v. Hibbert*, L. R. 1 C. C. R. 184; 38 L. J., M. C. 61.

I., an heiress, entitled to real property, came home to her mother's house from school for the Christmas holidays. Her mother, who had married again, insisted that she should go to her grandmother's according to a previous arrangement. Upon this she went to the house of her uncle H. B., and when her mother heard where she was, she desired her to come home to her, the mother. I. did not return to her mother's house, but, with the knowledge of her uncle H. B., went away with and was married to another uncle F. B. F. B. was indicted for fraudulently alluring I. and taking her out of her mother's possession, and H. B. for being an accessory before the fact. A majority of the court held that these facts did not sustain the conviction. *R. v. Burrell*, 1 L. & C. 354; 33 L. J., M. C. 54.¹

Proof of the want of consent. The want of consent of the father must be presumed, if it appears that, had he been asked, he would not

¹ Evidence is admissible on behalf of the defendant that the girl's father was never married to her mother to rebut the presumption of service. *Howland v. Howland*, 114 Mass. 517. Where the woman is of full age, a parent cannot recover under the statutory action for the injury. *Ryan v. Fralick*, 50 Mich. 483.

have consented. *Per* Wightman, J., in *R. v. Handley*, 1 F. & F. 648. In *R. v. Hopkins*, Car. & M. 264, Gurney, B., seemed to think that where a man by false and fraudulent representations, as by representing that he wished to place her in the service of a lady, induced the parents of a girl between ten and eleven years of age to allow him to take her away, such taking away was an abduction within the statute. This would be in accordance with the general principle, that a consent obtained by fraud avails nothing.

The statute says, "out of the possession and against the will of her father or mother, or of any other person having the lawful care or *charge of her." Mr. East suggests that it deserves good consideration before it is decided, that an offender acting in collusion with one who has the temporary custody of another's child for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute; for otherwise every school-mistress might dispose of the children committed to her care, though such delegation of a child for a particular purpose be no delegation of the power of disposing of her in marriage; but the governance of the child in that respect may still be said to remain in the parent. 1 East, P. C. 457. Probably the only way of meeting this case is to hold that, by the fraud of the temporary guardian, the latter loses all right to the possession of the child, who reverts into the possession of her natural guardian. And in accordance with the above view, Amphlett, B., in a case tried at Leeds Assizes, March, 1875 (after consulting Coleridge, C. J.), ruled that by the fraud of the temporary guardian, the right to possession of the child had reverted. The learned judges had determined to reserve the point; but the case ended in an acquittal as the girl turned out to be above age.

Proof of the age. In cases where the offence depends upon the age this must be proved in the usual way, by the girl herself, or by a person who can speak to the date of the birth. In *R. v. Robins*, 1 C. & K. 456, 47 E. C. L.,¹ it was held that it was no defence that the prisoner did not know that the girl was under sixteen, or that from her appearance he might have thought that she was of greater age; followed by Willes, J., in *R. v. Mycock*, 12 Cox, C. C. 28, and Bramwell, B., in *R. v. Olifer*, *supra*, or that he really thought she was of greater age. *Per* Quain, J., in *R. v. Booth*, 12 Cox, C. C. 231. The point was finally settled by the full court, when fifteen judges out of sixteen held that the prisoner was rightly convicted, though he *bond fide* believed and had reasonable grounds for believing that the girl was over sixteen; *R. v. Prince*, L. R. 2 C. C. 154; 44 L. J., M. C. 122. Brett, J., was the only dissentient judge. And it would seem that his judgment is inconsistent with his previous ruling in a case of bigamy (*R. v. Gibbons*, 12 Cox, C. C. 237, see *post*, "Bigamy.")

Proof of the intent. In cases of abduction of a girl under sixteen, it is no defence that the act was committed from no bad motive,

¹ *People v. Stott*, 4 N. Y. Crim. Rep. 306.

or even from philanthropic and religious motives. *R. v. Booth, supra.* It is only in the case of a female over sixteen years that the intent to marry or carnally know is an ingredient in the offence. This intent may be inferred either from the solicitations addressed to the woman herself, or from the preparations made by the prisoner. The only intent which is necessary to prove under s. 55, is the intent to deprive the parent or other person of the possession of the child; *R. v. Timmins*, 30 L. J., M. C. 45.

The same intent as that last mentioned will constitute an offence under s. 56; but under this section it is also an offence to entice or take away the child, without any intent to deprive her father or other person having lawful custody of her, of the possession of her, but with the intent of stealing any article upon or about the person of such child, to whomsoever such article may belong.¹

Proof of the woman being an heiress, etc. To constitute the offence described in the first part of s. 53, it is necessary that the woman *273] should have an interest, legal or equitable, present or future, absolute, conditional, or contingent, in some real or personal estate, or should be an heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin to someone having such interest, and the abduction must be from "motives of lucre," by which, it is supposed, is meant that the prisoner when he carried off the woman had in view the advancement of his own pecuniary position, by using the legal rights of a husband over his wife's property. If this is so, why the intent to carnally know was inserted does not clearly appear; because a man can only carnally know a woman *from motives of lucre* when his plan is thereby to coerce her into a marriage, so that if the statute had expressed the intent to marry only, it would have been enough. It is quite clear that carrying off an heiress from motives of lust only would not be an offence under this part of the statute.

Looking to the much more general provisions of s. 54, it is probably only necessary to pay any attention to the provision we have just been discussing, where it is wished to make sure that the husband shall be deprived of any benefit from the wife's property, according to the last provision in s. 53.

As no motives of lucre are mentioned in the second class of offences mentioned in s. 53, it seems that fraudulently alluring, taking away, or detaining a woman under twenty-one years of age, with intent to marry or carnally know her, would be felony, whatever the motives might be, provided she was such a woman as came within the description in the first part of the section, namely, an heiress. It follows that alluring "an heiress" between the ages of seventeen and twenty-

¹ In the case of child stealing, an intent to conceal or detain the child must be proved. *Mayo v. State*, 43 Ohio St. 567. Under the New York statute in regard to abduction there must be proved both a taking and an unlawful intent. *People v. Platt*, 4 N. Y. Crim. Rep. 53. In an indictment for the abduction of a female under the statutory age, the knowledge of the female thereon is immaterial. *People v. Stott*, 4 N. Y. Crim. Rep. 306.

one, from motives of lust, would be a felony, but alluring a woman of no property or expectations, between these ages, from the same motives, would be no offence at all. The reason of this is not quite apparent.

Evidence of the woman when taken away and married. *Ante*, tit. "Incompetency of Witness."¹

¹ While under the statutes, against seduction under a promise of marriage, the prosecutrix is a competent witness, her testimony in most jurisdictions is insufficient without corroboration. In New York this corroboration may be made by circumstantial evidence. *Boyce v. People*, 55 N. Y. 644; *State v. Brinkhaus*, 34 Minn. 285; *Armstrong v. People*, 70 N. Y. 38. This corroboration need not be of the particular act testified to by the woman. It is sufficient if it covers a period including the specified time. *Id.* The corroboration need not be positive or direct. *People v. Stott*, 4 N. Y. Crim. Rep. 306. The prosecutrix may testify that she was with child at the time of the trial some seven months after the commission of the alleged offence. And also as to her belief in the defendant's promise of marriage. *Armstrong v. People*, 70 N. Y., 38. An accomplice is a competent witness to corroborate the prosecutrix. *People v. Powell*, 4 N. Y. Crim. Rep. 585. Where witnesses have testified that the prisoner kept company with the prosecutrix, he may show that she also kept company with other men, to rebut the inference of a promise of marriage. *Stinehouse v. State*, 47 Ind. 17.

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*ABORTION.

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Offence at common law. A child *en ventre sa mère* cannot be the subject of murder, *vide post* "Murder." At common law an attempt to destroy such a child appears to have been held to be a misdemeanor. 3 Chitt. Cr. Law, 798; 1 Russ. Cri. 853, 5th ed.

If, however, with the attempt to procure abortion a person does an act whereby a living child is brought into the world immaturely, and who dies in consequence, that would be murder in the person doing the act.¹ *Per* Maule, J., in *R. v. West*, 2 C. & K. 784, 61 E. C. L.

By statute. This offence was formerly provided for by the 7 Will. 4 & 1 Vict. c. 85 (E. & I.) s. 6, which is now repealed; and by the 24 & 25 Vict. c. 100, s. 58, it is enacted, that "Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever, with the like intent, and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

By s. 59, "whosoever shall unlawfully supply, or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be

¹ To cause abortion when the child is quick is not murder or manslaughter at common law, but a great misdemeanor. Although the law, for many civil purposes, recognizes the existence of a child from its conception, it does not for the purpose of punishing its destruction, recognize it as a living being until it quickens and stirs in the womb. *State v. Cooper*, 2 Zab. 52. It is not a punishable offence by the common law, to perform an operation upon a pregnant woman with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child. *Commonwealth v. Parker*, 9 Metc. 263. *Contra* *Mills v. Commonwealth*, 13 Pa. St. 631, S.

not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor."¹

Proof of the administering. Where the prisoner gave the prosecutrix a cake containing poison, which she merely put into her mouth, and spat it out again without swallowing any portion of it; the judges *held, that a mere delivery did not constitute an adminis- [*275
tering within the 43 Geo. 3, c. 58, and that there was no ad-
ministering unless the poison was taken into the stomach. *R. v. Cadman*, Carr. Supp. 237. And see *R. v. Harley*, 4 C. & P. 370, 19 E. C. L., where the report of this case in 1 Moo. C. C. 114, is stated to be inaccurate. But to constitute an administering there need not be an actual delivery by the hand of the prisoner. *R. v. Harley*, *supra*.

Upon an indictment under this section, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute. *R. v. Wilson*, Dears. & B. C. C. 127; *R. v. Farrow*, Id. 164, acc. See *R. v. Fretwell*, 31 L. J., M. C. 145.²

See further as to administering, *infra*, tit. "Poison."

Proof of the nature of the thing administered. The nature of the poison or other noxious thing must be proved. Upon an indictment on the repealed 43 Geo. 3, c. 58, s. 2, for administering *savin* to a woman not quick with child, with intent, etc., the charge was that the prisoner administered "six ounces of the decoction of a certain shrub called *savin* then and there, being a noxious and destructive thing." It appeared that the prisoner had prepared the medicine by

¹ Under New York statute, the death of the mother or child is necessary to constitute the offence. *Davis v. People*, 2 Thomp. & C. (N. Y.) 212. For the law on this subject in the various States see *Mills v. Commonwealth*, 13 Pa. St. 631; *State v. Slagle*, 83 N. C. 630; *Commonwealth v. Bangs*, 9 Mass. 387; *Commonwealth v. Jackson*, 15 Gray, (Mass.) 187; *State v. Cooper*, 2 Zab. (N. J.) 52; *Hatfield v. Gano*, 15 Ia. 177; *Mitchell v. Commonwealth*, 78 Ky. 204; *State v. Emrich*, 18 Mo. Ap. 493; *People v. Davis*, 56 N. Y. 95; *Harper v. State*, 35 Ohio St. 78. Where the statute specifically describes the offence withdrawing it from the grade of murder and prescribing the punishment therefor, one who causes the death of a woman, in attempting to procure a miscarriage, cannot be indicted for murder. *Commonwealth v. Rail- ing*, 113 Pa. St. 37; s. c. 1 Pa. Sup. Ct. Dig. 121. See also *Robbins v. State*, 8 Ohio St. 131; *Commonwealth v. Jackson*, 15 Gray, (Mass.) 187; *Lamb v. State*, 26 Am. Law Reg. 641 and note.

² The dying declaration of the woman that the defendant "operated on her" is admissible against him. Such a statement is not an expression of opinion. Evidence that two or three days before, she said "her husband had tried to deliver her and failed," is hearsay and cannot be introduced to contradict her declaration. *Maine v. People*, 9 Hun, (N. Y.) 113; *Davis v. People*, 2 Thomp. & C. (N. Y.) 212. But see *Harper v. State*, 35 Ohio St. 78. The State may show that the prisoner bought the alleged drug. *State v. Cole*, 94 N. C. 958.

pouring boiling water on the leaves of the shrub ; and the medical men examined stated that such preparation is called an *infusion* and not a decoction. It was objected that the medicine was misdescribed, but Lawrence, J., overruled the objection. He said *infusion* and decoction are *ejusdem generis*, and the variance is immaterial. The question is, whether the prisoner administered *any matter or thing* to the woman with intent to procure abortion. *R. v. Phillips*, 3 Campb. 78. The authority of this decision appears to have been recognized by Vaughan, B., in the following case: The prisoner was indicted under the 9 Geo. 4, c. 31, s. 13, for administering saffron to the prosecutrix, with intent to procure abortion. The counsel for the prisoner cross-examining as to the innocuous nature of the article administered, Vaughan, B., said, "Does that signify? It is with the intention that the jury have to do ; and if the prisoner administered a bit of bread merely with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the act of Parliament." *R. v. Coe*, 6 C. & P. 403, 25 E. C. L. The words in the clause of the repealed statute 9 Geo. 4, c. 31, s. 13, under which the prisoner appears to have been indicted in this case were "any medicine or other thing." In a case upon the present statute, where the prisoner was indicted for supplying "a certain noxious thing," and the evidence was, that the thing supplied was of a perfectly harmless character in itself, though if taken with the belief that it would procure a miscarriage, it might, by acting on the imagination, produce that effect ; it was held, that the conviction must be quashed, as there was no evidence that the thing supplied was noxious. *R. v. Isaacs*, 1 L. & C. 220 ; 32 L. J., M. C. 52. But where there was no evidence of the ingredients of the thing administered, or of its character being harmless or otherwise, except that in fact it made the witness ill and produced miscarriage, it was held that there was evidence of its being a noxious thing. *R. v. Hollis*, 12 Cox, C. C. R. 463. If the drug be innocuous if taken in *276] small quantities, but harmful if taken in large, it would appear to be a noxious thing, but, query, if it be a recognized "poison," it would perhaps come within the Act even if administered in so small a dose as to be innocuous. 24 & 25 Vict. c. 100, s. 58 ; *R. v. Cramp*, 5 Q. B. D. 307 ; 49 L. J., M. C. 44 ; *R. v. Hennah*, 13 Cox, 547.

The former statutes on this subject, the 43 Geo. 3, c. 58, and 9 Geo. 4, c. 31, distinguished between the case where the woman was quick and was not quick with child, and under both acts the woman must have been pregnant at the time. See *R. v. Scudder*, 3 C. & P. 605, 14 E. C. L. ; 1 Moo. C. C. 216. The terms of the repealed statute 7 Will. 4 & 1 Vict. c. 85, s. 6, were "with intent to procure the miscarriage of any woman," omitting the words "being then quick with child," etc. ; under which it was held that it was immaterial whether the woman is or is not pregnant, if the prisoner, believing her to be so, administers the drug, or uses the instrument, with the intent of producing abortion. *R. v. Goodall*, 1 Den. C. C. 187. Acc. *R. v. Gaylor*, Dears. & B. C. C. 288. Under the present statute the case is expressly provided for.

Proof of the intent. The intent will probably appear from the other circumstances of the case. That the child was likely to be born a bastard, and to be chargeable to the reputed father, the prisoner, would be evidence to that effect. Proof of the clandestine manner in which the drugs were procured or administered would tend to the same conclusion.¹

The statute is satisfied if the person who supplies the thing intends it to be used for the purpose of procuring abortion, though the person to whom it was supplied had no intent to use it for any such purpose. *R. v. Hillman*, L. & C. 343 ; 33 L. J., M. C. 60.

¹Intent may be shown by evidence that the defendant published a circular three years previously tending to show that he was engaged in the business of procuring abortions. *Weed v. People*, 56 N. Y. 623.

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*AFFRAY.

AN affray is the fighting of two or more persons in some public place, to the terror of the king's subjects; for if the fighting be in private, it is not an affray, but an assault. 4 Bl. Com. 145. See *Timothy v. Simpson*, 1 Cr., M. & R. 757. It differs from a riot, in not being premeditated. Thus if a number of persons meet together at a fair or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engaged in it); because the design of their meeting was innocent and lawful; and the breach of the peace happened without any previous intention. Hawk. P. C. b. 1, c. 65, s. 3. Two persons may be guilty of an affray, but it requires three or more to constitute a riot. *Vide post*. Mere quarrelsome words will not make an affray. 4 Bl. Com. 146; 1 Russ. Cri. 390, 5th ed.

To support a prosecution for an affray, the prosecutor must prove—1, the affray, or fighting, etc.; 2, that it was in a public place; 3, that it was to the terror of the king's subjects; 4, that two or more persons were engaged in it.

The principals and seconds in a prize fight were indicted in one count for a riot, and in another for an affray. The evidence was that the two first prisoners had fought together amidst a great crowd of persons, and that the others were present aiding and abetting; that the place where they fought was at a considerable distance from any highway, and when the officers made their appearance the fight was at an end. The prisoners, on being required to do so, quietly yielded. Alderson, B., said, "it seems to me that there is no case against these men. As to the affray, it must occur in some public place, and this is to all intents and purposes a private one. As to the riot, there must be some sort of resistance made to lawful authority to constitute it, some attempt to oppose the constables who are there to preserve the peace. The case is nothing more than this:—Two persons choose to fight, and others look on, and the moment the officers present themselves, all parties quietly depart. The defendants may be indicted for an assault, but nothing more."¹ *R. v. Hunt*, 1 Cox, C. C. 177; and see *R. v. Brown*, Car. & M. 314.

¹ One may be acquitted and the other convicted. [*McClellan v. State*, 53 Ala. 640.] It may be an affray though the parties fight without consent being proved. *Cash v. State*, 2 Overton, (Tenn.) 198; *Duncan v. Commonwealth*, 6 Dana, 295; *Simpson v. State*, 5 Yerg. 356. [If a person induces another to strike him he is guilty, though he did not return the blow. *State v. Fanning*, 94 N. C. 940.] One who aids, assists, and abets an affray, is guilty as principal. *Carlin v. State*, 4 Yerg. 143; *Duncan v. Commonwealth*, 6 Dana, 295; *State v. Benthall*, 5 Humph. 519; *State v. Priddy*, 4 Humph. 429. It must be in a public place. *State v. Sumner*, 5 Strob. 53. A field surrounded by a forest and situated one mile from any highway or other public place, does not lose its

The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for where there is any material aggravation, the punishment will be proportionally increased. 4 Bl. Com. 145; 1 Hawk. P. C. c. 63, s. 20; 1 Russ. Cri. 395, 5th ed.

private character by the casual presence of three persons, so as to make two of them who fight together willingly, guilty of an affray. *Taylor v. State*, 22 Ala. 15. Words alone will not constitute an affray; but accompanied by acts, such as drawing knives and attempting to use them in a public street of a city, will. *Hawkins v. State*, 13 Ga. 322. 8.

A plea of self-defence is untenable where the prisoner had an opportunity to retreat. *State v. Downing*, 74 N. C. 184.

*278] *AGENTS, BANKERS, FACTORS, ETC.—FRAUDS COMMITTED BY.

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FRAUDS committed by bankers, merchants, brokers, attorneys and other agents were provided for by the 52 Geo. 3, c. 63; that statute was repealed and other provisions substituted by the 7 & 8 Geo. 4, c. 29, 5 & 6 Vict. c. 39, and the 20 & 21 Vict. c. 54. These statutes are also now repealed, and the statute at present in force is the 24 & 25 Vict. c. 96.

Agents, bankers, factors, etc., embezzling money or selling securities or goods. By s. 75, "Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money *with any direction in writing* to apply, pay or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, *for any purpose, or to any person specified* in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively, and whosoever having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, *279] *or society, for *safe custody or for any special purpose*, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which

such chattel, security or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.”

Provisions not to affect trustees, or mortgagees, or bankers in certain cases. By the same section, “nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed, nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him, by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand.”

Agents, bankers, merchants, etc., fraudulently selling property.

By s. 76, “Whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely, or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, or for the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.”

Fraudulently selling property under powers of attorney.

By s. 77, “Whosoever, being intrusted, either solely or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted

thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

***280] *Factors or agents fraudulently obtaining advances on property.** By s. 78, "Whosoever, being a factor or agent intrusted, either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security, for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

Clerks wilfully assisting. By the same section, "Every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the same punishments."

Exception where the pledge does not exceed lien. By the same section, "Provided that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent."

Definitions of terms. By s. 79, "Any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such factor or agent having been intrusted with the possession of the goods or of any other document of title thereto, shall be

deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be deemed to be possessed of such goods or document whether the same shall be in his actual custody or shall be held by any other person subject to his control, or for him, or on his behalf; and when any loan or advance shall be *bond fide* made to any factor or agent intrusted with and in *possession of any such goods or document of title on the faith of any contract or agreement in writing to consign, deposit, [281 transfer, or deliver goods or document of title, and such goods or document of title shall actually be received by the person making such loan or advance without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not really be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section."

It is doubtful whether a policy of insurance is "a chattel or valuable security" within the second branch of s. 75. *R. v. Tatlock*, L. R. 2 Q. B. D. 157; 46 L. J., M. C. 7, see *infra*, it seems not *per* Cockburn, C. J.; but even if not it seems it is "a security for the payment of money" within the first branch of the section.

See further as to interpretation of terms "property," "valuable security," "document of title," etc., 24 & 25 Vict. c. 96, s., *post*, tit. "Larceny."

Possession to be evidence of intrusting. By the same section, "A factor or agent in possession as aforesaid of such goods or document shall be taken, for the purpose of the last preceding section, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence."

Persons accused not protected from answering. By s. 85, "Nothing in any of the last ten preceding sections of this act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency."

Persons making disclosures in a compulsory proceeding not liable to prosecution. By the same section, "No person shall be

liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bond fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency."

Nature of disclosure which protects party making it. Under the previous statute 5 & 6 Vict. c. 39, s. 6, the terms of which differed somewhat from those of the 24 & 25 Vict. c. 96, s. 85, *supra*, as to the nature of the disclosure which would protect a defendant, the following decision took place. The defendants were charged before *282] a magistrate on the 13th of July, under the above section, with having fraudulently transferred a bill of lading, intrusted to them as brokers, and were fully committed for trial. On the 6th of July preceding they had been adjudged bankrupts, and on the 20th of the same month, while the above prosecution was pending against them, being examined in the court of bankruptcy at the instance of a creditor, they made a statement to the same effect as that proved against them before the magistrate, and amounting to a confession of guilt. When the trial came on the defendants pleaded not guilty, and after the case for the prosecution had closed, tendered in evidence the depositions made by them in the court of bankruptcy in bar of prosecution under the proviso in the above section. The prisoners were convicted; two points being reserved for the opinion of the Court of Criminal Appeal: first, whether the evidence was admissible under a plea of not guilty; secondly, whether it showed a *disclosure* within the meaning of the proviso, so as to constitute a defence. All the court thought that the evidence was admissible, and also expressed an opinion that it was tendered at the proper time. But on the other point there was a difference of opinion. Lord Campbell, C. J., Pollock, C. B., Wightman, Willes, and Hill, JJ., Martin, Bramwell, Watson, and Channell, BB., thought that the statement in the court of bankruptcy was not, under the circumstances, a disclosure within the meaning of the above section. Cockburn, C. J., Williams, Crowder, Crompton, and Byles, JJ., thought that it was. The conviction was, therefore, affirmed. *R. v. Skeen*, 1 Bell, C. C. 97; s. c. 28 L. J., M. C. 91. See also *R. v. Scott*, 25 L. J., M. C. 128; *Dears. & B. C. C.* 47, and *R. v. Robinson*, L. R. 1 C. C. R. 80; *R. v. Widop*, L. R. 2 C. C. R. 3, 42 L. J., M. C. 9, *ante*, p. 52.

In the present enactment the word "first" is introduced before the word "disclosed," in order to obviate any doubt which may arise in future on this point. *Greaves' Crim. Stat.* p. 92.

Persons intrusted as banker, merchant, broker, attorney, or other agent. Cases under sections 75 and 76. The prisoner, an

insurance broker, had, as such, effected insurances on a ship for the prosecutor; and the ship having been lost, the prosecutor sent him the policies with other documents necessary for recovering the loss; the prisoner received the amount of the policies in cheques to his order, which he then paid into his own bank to his own credit, but did not account to the prosecutor at the time, though pressed to do so. He afterwards became bankrupt, when it was discovered that his balance at the bank was much less than the sum received on the policies. The prisoner, having been convicted on an indictment framed on the second branch of s. 75, it was held that the conviction could not be upheld. Cockburn, C. J., held that it must be shown that the prisoner at the time he received the money for the policies intended to embezzle it. Kelly, C. B., appeared to doubt this view, and joined with Pollock, B., in thinking the evidence as to the course of dealing between the parties too vague to enable them to come to any decision. Bramwell and Amphlett, JJ. A., and Field, J., thought that the second branch of the section only applies to cases where an agent has been intrusted with securities without authority to obtain money upon them, and has got the money by some unauthorized act of his own. *R. v. Tatlock*, L. R. 2 Q. B. D. 157; 46 L. J., M. C. 7.

In order to support a conviction under s. 75 of 24 & 25 Vict. c. 96, *there must be a direction in writing under the first part of the section, and in order to support a conviction under s. 76, the [*283 defendant must have improperly sold or otherwise misappropriated property intrusted to him without authority to sell. Thus, where the defendant, an attorney, was employed to raise a loan of money on mortgage, of which he was orally instructed to apply a part in paying off an earlier mortgage, and to hand over the rest to the mortgagor; and having prepared the mortgage-deed, and received the mortgage money, and handed over the deed to the mortgagee in exchange, he then misappropriated a part of the money to his own use, it was held that he could not be convicted of any offence under s. 75 or s. 76 of 24 & 25 Vict. c. 96. *R. v. Cooper*, L. R. 2 C. C. R. 123; 43 L. J., M. C. 89. And a solicitor who had misappropriated money intrusted by a client to invest on mortgage, was held not to be guilty of an offence under s. 76. *R. v. Newman*, 8 Q. B. D. 706; 51 L. J., M. C. 87, there being no evidence to show that any specific sum was intrusted, or that there were any specific directions as to the custody of it; but otherwise, where a solicitor was intrusted with the money of his client to keep it safely until a certain day, and then invest it, for in such case he would be intrusted with the money "for safe custody," within s. 76. *R. v. Fullager*, 14 Cox, C. C. R. 370; 41 L. T. N. S. 448.

The prisoner, a stock and share dealer, was employed by the prosecutrix to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in cheques for round sums. On one occasion he wrote to her, "I inclose a contract note for

£300, J. bonds, at 112, £336;" and the contract note ran, "sold to Mrs. S. (the prosecutrix) £300, J., at 112, £336," and was signed by the prisoner. The prosecutrix wrote in reply, "I have just received your note and contract note for three J. shares, and inclose a cheque for £336 in payment." The prisoner never paid for the bonds, but in violation of good faith appropriated to his own use the proceeds of the cheque. It was held that the letter of the prosecutrix was a direction in writing to apply the proceeds of the cheque to pay for the bonds, if they still had to be paid for, within the meaning of s. 75 of 24 & 25 Vict. c. 96. *R. v. Christian*, L. R. 2 C. C. R. 94; 43 L. J., M. C. 25.

Misappropriation under the Municipal Corporations Act, 1882. The provisions of the above act are applied to persons misappropriating money arising from the sale of annuities or securities purchased or transferred under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 117).

*ARSON.

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At common law. The offence of arson, which is a felony at common law, is defined by Lord Coke to be the malicious and voluntary burning the house of another, by night or by day.¹ 3 Inst. 66; 1 Hale, C. P. 566.

The *setting fire* to the house of another, maliciously to burn it, is *not at common law a felony, if either by accident or timely prevention the fire does not take place.² 1 Hale, P. C. 568. [*285

¹ Overstreet v. State, 46 Ala. 30; McGary v. People, 45 N. Y. 153. S.

² Commonwealth v. Van Schaack, 16 Mass. 105; People v. Butler, 16 Johns. 203. See Ball's Case, 5 Rog. Rec. 85. To attempt to fire a house is a misdemeanor at common law. Orr's Case, 5 Id. 181. The least burning of the house is sufficient to constitute the crime. The charring of the floor to the depth of half an inch is certainly

By statute. The various offences of burning have been long provided for by the 9 Geo. 1, c. 22, the 7 & 8 Geo. 4, c. 30, and the 7 Will. 4 & 1 Vict. c. 89. These statutes are all now repealed, and the offence is regulated for the most part by the 24 & 25 Vict. c. 97.

Churches and chapels. By s. 1, "whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house or other place of divine worship, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Dwelling-house, any person being therein. By s. 2, "whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."¹

House, outhouse, manufactory, farm, etc. By s. 3, "whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, store-house, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."²

Railway stations and buildings belonging to ports, docks, and harbors. By s. 4, "whosoever shall unlawfully and maliciously set fire to any station, engine house, warehouse, or other building belong-

sufficient. *State v. Sandy*, 3 Ired. 570. An indictment for arson merely charging that the defendant set fire to a house with intent to injure the owner, without charging the burning is totally defective. *Mary v. State*, 24 Ark. 44. S.

¹ The State statute concerning arson of a dwelling-house or barn, does not include unfinished structures which have never been actually occupied for such uses. *State v. Wolfenberger*, 20 Ind. 242. S.

² A banking-house is a store, shop, or warehouse. *Wilson v. State*, 24 Conn. 57. S.

ing or appertaining to any railway, port, dock, or harbor, or to any canal or other navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping.”

***Public buildings.** By s. 5, “whosoever shall unlawfully and maliciously set fire to any building other than such as are [*286 in this act before mentioned belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping.”

Other buildings. By s. 6, “whosoever shall unlawfully and maliciously set fire to any building other than such as are in this act before mentioned shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping.”

Goods in buildings. By s. 7, “whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping.”

Attempting to set fire to buildings. By s. 8, “whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any building, or any matter or thing in the last preceding section mentioned under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three [now five] years,—or to be imprisoned for any term

not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Crops of corn, woods, plantations, gorse, etc. By s. 16, "whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees; or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Stacks of corn, straw, wood, coals, etc. By s. 17, "whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Attempting to set fire to crops or stacks of corn, etc. By s. 18, "whosoever shall unlawfully and maliciously, by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned under such circumstances that if the same were thereby set fire to the offender would be under either of such sections guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Coal mines. By s. 26, "whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall be guilty of felony." The same punishment as in s. 17.

Attempt to set fire to coal mines. By s. 27, "whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any

mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.”

Ships or vessels. By s. 42, “whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not exceeding three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.”

As to the setting fire to ships with intent to commit murder, see 24 & 25 Vict. c. 100, s. 13, *infra*, tit. “Attempt to Murder.”

***Ships or vessels, with intent to prejudice owner or [*288 underwriter.** By s. 43, “whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.”

Setting fire to ships of war, etc. By the 12 Geo. 3, c. 24, s. 1, “if any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully or maliciously set on fire or burn, or otherwise destroy, or cause to be set on fire or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning, or otherwise destroying any of his majesty’s ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his majesty’s dockyards, or building or repairing by contract in any private yards for the use of his majesty, or any of his majesty’s arsenals, magazines, dockyards, ropeyards, victualling offices, or any of the buildings erected therein or belonging thereto; or any timber or materials there placed, for building, repairing, or fitting out

of ships, or vessels, or any of his majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places, where any such military, naval, or victualling stores, or other ammunition of war, is, are, or shall be kept, placed, or deposited; that then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy."

By s. 2, "any person who shall commit any of the offences before mentioned, in any place out of this realm, may be indicted and tried for the same, either in any shire or county within this realm, in like manner, and form as if such offence had been committed within the said shire or county, or in such island, county or place where such offence shall have been actually committed, as his majesty, his heirs or successors, may deem most expedient for bringing such offender to justice: any law, usage, or custom notwithstanding." This offence is still capital, 7 & 8 Geo. 4, c. 28, ss. 6 and 7.

By the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109, s. 34), persons subject to that act are liable to the punishment of death for setting fire to dockyards, ships, etc.

Setting fire to ships, etc., in the port of London. The 39 Geo. 3, c. 69, a public local act for rendering more commodious and for better regulating the port of London, enacts (by s. 104), "that if any person or persons whomsoever shall wilfully and maliciously set on fire any of the works to be made by virtue of this act, or any ship or other vessel lying or being in the said canal, or in any of the docks, basins, cuts, or other works to be made by virtue of this act, every *289] *person so offending in any of the said cases shall be adjudged guilty of felony without benefit of clergy."

Attempting to set fire to ships or vessels. By the 24 & 25 Vict. c. 97, s. 44, "whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, cast away, or destroy any ship or vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Malice against owner of property unnecessary. By s. 58, "every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise."

Where person committing the offence is in possession of the property injured. By s. 59, "every provision of this act not herebefore so applied, shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts herebefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done."

Intent to injure or defraud a particular person need not be stated. By s. 60, "it shall be sufficient in any indictment for any offence against this act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be)."

Proof of the setting fire. To constitute arson at common law it must be proved that there was an actual burning of the house or of some part of it, though it is not necessary that any part should be wholly consumed, or that the fire should have any continuance; 2 East, P. C. 1020; 1 Hale, P. C. 569.¹ In the 9 Geo. 1, c. 22, the words "set fire" are used, and Mr. East observes, that he is not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law. 2 East, P. C. 1020. And he afterwards remarks, that the actual burning at common law, and the "setting fire" under the statute, in effect mean the same thing. Id. 1038. The words "set fire" are used in all the subsequent statutes, so that this passage and the following decisions are still applicable. The prisoner was indicted (under the 9 Geo. 1, c. *22) for setting fire to an outhouse, commonly called a paper-mill. It appeared that she had set fire to a large quantity of [*290 paper, drying in a loft annexed to the mill, but no part of the mill itself was consumed. The judges held that this was not a *setting fire* to the mill within the statute. *R. v. Talyor*, 2 East, P. C. 1020; 1 Leach, 49. So on a charge of arson, it appeared that a small faggot was set on fire on the boarded floor of a room, and the faggot was nearly consumed; the boards of the floor were "scorched black, but not burnt," and no part of the wood of the floor was consumed. Cresswell, J., said, "*R. v. Parker* (see *infra*) is the nearest case to the present, but I think it is distinguishable. . . . I have conferred with my brother Patteson, and he concurs with me in thinking, that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all." *R. v. Russell*, Car. & M. 541. Where the prisoner was

¹ *Commonwealth v. Tucker*, 110 Mass. 403.

indicted under the 7 Will. 4 & 1 Vict. c. 89, s. 3, and it was proved that the floor near the hearth was scorched, and it was in fact charred in a trifling way; that it had been at a red heat, though not in a blaze; Parke, B., held that the offence was complete. *R. v. Parker*, 9 C. & P. 45, 38 E. C. L. To constitute a setting on fire, it is not necessary that any flame should be visible. *R. v. Stallion*, 1 Moo. C. C. 398, *post*, p. 293.

Many of these cases come within the felony created by the 24 & 25 Vict. c. 97, namely, that of attempting to set fire to a building, etc. And even if a count for the attempt were not contained in the indictment, the prisoner might be found guilty of it under the 14 & 15 Vict. c. 100, s. 9; *infra*, "Attempts."

Proof of property set fire to. In order to constitute the felonious offence of arson at common law, the fire must burn the house of *another*. The burning of a man's own house is no felony at common law, but such burning in a town, or so near to other houses as to create danger to them, is at common law a misdemeanor; 1 Hale, P. C. 568; 2 East, P. C. 1027. But it is a felony at common law if a man set fire to his own house with intent to burn that of another, or under such circumstances that the house of another would in all probability be burnt; 2 East, P. C. 1030; and the case of *R. v. Probert*, there cited. Now, however, under the various sections of the statutes mentioned above, the crime of arson has a much wider scope.

A misdescription in the nature of the property might now be amended under the 14 & 15 Vict. c. 100, s. 1. Still it is necessary to prove the nature of the property set fire to, in order to show that the property comes within the meaning of one or the other of the above sections, and which.

Many of the cases in the books were decided upon the statutes which are now repealed. But, as the language of the present statute is identical, in many respects, with that of those which preceded, these decisions are still, in a great measure, applicable.

Proof of property set fire to—house. The word *house* includes, as it seems, all such buildings as would come within that description, upon an indictment for arson at common law.¹ That includes such buildings as burglary may be committed in at common law; but whether the *word would now be held to include all such buildings as burglary may be committed in under the repealed statute, 7 & 8 Geo. 4, c. 29, s. 13, seems to be doubtful. See Greaves' Statutes,

¹ When the prisoner was charged with burning a dwelling-house, and it appeared that the building burned was designed and built for a dwelling-house; was constructed like one; was not painted, though designed to be, and some of the glass in an outer door had not been put in, it was held that this was not a dwelling-house, in such a sense, that the burning of it would constitute the crime of arson. But the law is otherwise with regard to a dwelling-house, once inhabited as such, and from which the occupant is but temporarily absent. *State v. McGowen*, 20 Conn. 245. See *Stevens v. Commonwealth*, 4 Leigh, 683; *People v. Cottrell*, 18 Johns. 115; *People v. Van Blaricum*, 2 Johns. 105; *Commonwealth v. Posey*, 4 Cal. 109. S.

212 (n). A building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not to be a *house*, *outhouse*, or *barn*, within the 9 Geo. 1, c. 22. It was said, that it was not a house in respect of which burglary or arson could be committed; that it was a house intended for residence, but not inhabited, and therefore not a dwelling-house, though intended to be one. That it was not an *outhouse*, because not parcel of a dwelling-house; and that it was not a *barn*, within the meaning of that word as used in the statute. *Elsmore v. Inhab. Hundred of St. Briavells*, 8 B. & C. 461, 15 E. C. L. So also *Lush, J.*, held that an unfinished structure, intended to be used as a dwelling-house when finished, was not a "house"; but he seemed to be doubtful whether it could be properly described as a "building" under section 6. *R. v. Edgell*, 11 Cox, C. C. 132. But where the wall and roof of a structure and part of the flooring were finished, and the internal walls prepared for plastering, it was held to be a "building" within section 6. *R. v. Manning*, L. R. 1 C. C. R. 338; 41 L. J., M. C. 11. Upon the construction of the statute (9 Geo. 1, c. 22), it has been held that a common gaol comes within the meaning of the word *house*. The entrance to the prison was through the dwelling-house of the gaoler (separated from the prison by a wall), and the prisoners were sometimes allowed to lie in it. All the judges held, that the dwelling-house was to be considered as part of the prison, and the whole prison was the house of the corporation to whom it belonged. One of the counts laid it as the house of the corporation; another, of the gaoler; and the third, of a person whom the gaoler suffered to live in the house. *R. v. Donnevan*, 2 East, P. C. 1020; 2 W. Bl. 682; 1 Leach, 69. But where a constable hired a cellar (as a lock-up house) under a cottage, and the cellar was independent of the cottage in all respects, it was held that the cellar was not properly described in an indictment for arson either as the dwelling-house of the constable, or as an outhouse of the cottage. *Anon. cor. Hullock, B.*, 1 Lewin, C. C. 8.

A shed or cabin, though built of stone, roofed, and with low fireplace and window, does not in a case of arson constitute a house within the 7 Will. 4 & 1 Vict. c. 89, s. 3, where the building was erected not for habitation, but for workmen to take their meals and dry their clothes in, and had not been slept in with permission of the owner. *R. v. England*, 1 C. & K. 533, 47 E. C. L.

Proof of property set fire to—chapel. Under the repealed statute 7 Will. 4 & 1 Vict. c. 89, s. 3, it was held to be not necessary to prove that a dissenting chapel is registered and recorded; the words "duly registered and recorded," which were contained in the repealed statute 7 & 8 Geo. 4, c. 30, s. 2, being omitted in the latter enactment.

Proof of property set fire to—outhouse. Upon the meaning of the word "outhouse," in the repealed statute, 9 Geo. 1, c. 22, the following case was decided: It appeared that the prisoner (who was

indicted for setting fire to an outhouse) had set fire to and burnt part of a building of the prosecutor, situated in the yard at the back of his dwelling-house. The building was four or five feet distant from the house but not *joined to it. The yard was inclosed on all sides, *292] in one part of the dwelling-house, in another by a wall, and in a third by a railing, which separated it from a field, and in the remaining part by a hedge. The prosecutor kept a public-house, and was also a flax-dresser. The buildings in question consisted of a stable and chamber over it, used as a shop for the keeping and dressing of flax. It was objected, that this was part of the dwelling-house, and not an outhouse; but the prisoner having been convicted, the judges were of opinion that the verdict was right. It was observed that though, for some purpose, this might be part of the dwelling-house, yet that in fact it was an outhouse. *R. v. North*, 2 East, P. C. 1021. The following case was decided upon the words of the same statute: The prisoner was indicted in some counts for setting fire to an outhouse, in others to a house. The premises burned consisted of a school-room, which was situated very near to the house in which the prosecutor lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school, with a garden and other premises, together with a court which surrounded the whole, were rented of the parish by the prosecutor at a yearly rent. There was a continued fence round the premises, and nobody but the prosecutor or his family had a right to come within it. It was objected for the prisoner that the building was neither a house nor an outhouse within the repealed statute, 9 Geo. 1 c. 22; but the judges were of opinion that it was correctly described either as an outhouse or part of a dwelling-house, within the meaning of the statute. *R. v. Winter*, Russ. & Ry. 295; 2 Russ. Cri. 911, 5th ed. The following case, upon the construction of the same word, arose on an indictment under the 7 & 8 Geo. 4: The place in question stood in an inclosed field, a furlong from the dwelling-house, and not in sight. It had been originally divided into stalls, capable of holding eight beasts, partly open and partly thatched. Of late years it was boarded all round, the stalls taken away and an opening left for cattle to come in of their own accord. There was neither window nor door, and the opening was sixteen feet wide, so that a wagon might be drawn through it, under cover. The back part of the roof was supported by posts, to which the side boards were nailed. Part of it internally was boarded and locked up. There was no distinction in the roof between the inclosed and the uninclosed part, and the inhabitants and owners usually called it the cow-stalls. Park, J., did not consider this an outhouse within the statute; but reserved the point for the opinion of the judges. Six of the judges were of opinion that this was an outhouse within the statute; but seven of their lordships being of a contrary opinion, a pardon was recommended. *R. v. Ellison*, 1 Moody, C. C. 336. See also *Hilles v. Inhab. of Shrewsbury*, 3 East, 457; *R. v. Woodward*, 1 Moody, C. C. 325.

The prisoner was tried before Littledale, J., upon an indictment, one count of which charged him with setting fire to an outhouse of W. D. The prosecutor was a laborer and poulterer, and had between two and three acres of land, and kept three cows. The building in question was in the prosecutor's farm-yard, and was three or four poles distant from the dwelling-house, from which it might be seen. The prosecutor kept a cart in it, which he used in his business of a poulterer, and also kept his cows in it at night. There was a barn adjoining the dwelling-house, then a gateway, and then another *range of buildings, which did not adjoin the dwelling-house or [*293 barn; the first of which from the dwelling-house was a pig-sty, then another pig-sty, then a turkey-house, adjoining to which was the building in question. The dwelling-house and farm formed one side of the farm-yard, and the three other sides were formed by a fence inclosing these buildings. The building in question was formed by six upright posts nearly seven feet high, three in the front and three at the back, one post being at each corner, and the other two in the middle of the front and back, these posts supporting the roof; there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood laid wide at the bottom and drawn up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farm-yard was entirely opened between the posts, one side of the building adjoining the turkey-house which covered that side all the way up to the roof, and that side was nailed to the turkey-house. The back adjoined a field and was a rail fence, the rails being six inches wide; these came four or five feet from the ground within two feet of the roof, and this back formed part of the fence before mentioned. The side opposite the turkey-shed adjoined the road, and was a pale fence, but not quite up to the top. One of the witnesses for the prosecution, a considerable farmer, said he should consider the building an outhouse. The prisoner was convicted, and sentence of death passed upon him, but execution was respited to take the opinion of the judges. All the judges present (except Tindal, C. J.) thought the erection an outhouse, and that the conviction was right. *R. v. Stallion*, 1 Moody, C. C. 398.

The prisoner was convicted before Mr. Justice Patteson at the Bedfordshire Spring Assizes, 1844, for feloniously setting fire to an outhouse of Thomas Bourn. The building set fire to was a pig-sty, that shut up at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor; the back of the pig-sty formed part of the fence between the prosecutor's and the adjoining property. The state of the premises was this: first, the prosecutor's house fronting the public road, with a back door opening into the yard; then a pale fence about two feet; then a cottage; then a barn attached to it; the cottage and barn were let by the prosecutor to a tenant; they opened to the road, and neither of them had any door or opening into the yard. Next to the cottage and barn was a stable; then a barn; then the pig-sty, all in the possession of the

prosecutor; and opening into the yard. Next to the pig-sty was a paled fence, and then a live hedge round to the house, in which hedge were three gates opening into an orchard and two fields. On the part of the prisoner it was contended that this pig-sty was not an outhouse within the repealed statute, 7 Will. 4 & 1 Vict. c. 89, s. 3. The above cases of Ellison, Haughton, and Stallion were referred to; as also the cases of Parrot, 6 C. & P. 402, 25 E. C. L.; Woodward, 1 Moody, C. C. 323; and Newil, Id. 458. The learned judge reserved the point for the opinion of the judges; and the case was considered at a meeting of all the judges, except Coleridge and Maull, JJ., in Easter term, 1844, when their lordships were unanimously of opinion that the conviction was right.¹ *R. v. Amos Jones*, 2 Moody, C. C. 308.

Proof of property set fire to—shed. In *R. v. Amos*, 2 Den. C. C. *294] ^{*}R. 65; 20 L. J., M. C. 103, it was held, that a building twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called "the workshop," used as a storehouse for seasoned timber, as a place for deposit of tools, and for the working up of timber, may be described as a "shed," under 7 & 8 Vict. c. 62 (repealed).²

Proof of property set fire to—stacks. A stack of flax with seed in it is "grain" within the meaning of the above enactments. *R. v. Spencer, Dears. & B. C. O. 131*. Under the repealed statute, 9 Geo. 1, c. 22, which made it felony to set fire to any cock, mow, or stack of corn, a man was indicted for being an accessory to setting fire to "an unthrashed parcel of wheat;" this was held to be insufficient; *R. v. Judd*, 1 Leach, 484; 2 East, P. C. 1018. In *R. v. Reader*, 4 C. & P. 245, 19 E. C. L.; 1 Moody, C. C. 239, the prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 17, for setting fire to "a stack of straw." It appeared in evidence that the stack in question was made partly of straw, there being two or three loads at the bottom, and the residue of haulm. The judges held that this was not a stack of straw within the statute. See *R. v. Brown*, 4 C. & P. 553 (n),

¹ *Jones v. Hungerford*, 4 G. & J. 402. A barn not connected with the mansion, but standing alone several rods distant therefrom, is an outhouse. *State v. Brooks*, 4 Conn. 446. The burning of a barn with hay and grain in it, is felony and arson at common law. *Sampson v. Commonwealth*, 5 W. & S. 385. A barn standing eighty feet from a dwelling-house, in a yard or lane with which there was a communication by a pair of bars, is within the curtilage of the house. *People v. Taylor*, 2 Mich. 250. S.

A conviction cannot be sustained under a count in an indictment charging an attempt to burn a "barn, parcel of a dwelling-house," the word feloniously being omitted, where the defendant has been acquitted on another count charging felonious arson. The count cannot be amended by adding "not" before parcel so as to bring it within the section of the act providing for arson as a misdemeanor. *Commonwealth v. Weiderhold*, 1 Pa. Sup. Ct. Dig. 103, s. c. 17 Weekly Notes Cases, (Pa.) 430.

² In Alabama, under an indictment for arson in the third degree for burning a "corn crib," evidence that corn and fodder were kept there is relevant, but not evidence of what was there at the time of burning. The value of the building and contents need not be proved. *Broom v. State*, 52 Ala. 345.

19 E. C. L. ; *R. v. Tottenham*, 7 C. & P. 237, 32 E. C. L. ; 1 Moo. C. C. 461. It was held sufficient under the last-mentioned statute, if the indictment charged the prisoner with setting fire to a *stack of barley* ; *R. v. Swatkins*, 4 C. & P. 548, 19 E. C. L. ; or a *stack of beans* ; *R. v. Woodward*, 1 Moody, C. C. 323, the words of that statute being "any corn, grain, pulse, straw, hay, or wood." In *R. v. Aris*, 6 C. & P. 348, 25 E. C. L., the prisoner was indicted under the same statute for setting fire to a "stack of wood," and it appeared that between the house of the prosecutor and the next house there was an archway over which a sort of loft was made by means of a temporary floor, where there was a small quantity of straw and a store of faggots piled on one another ; the straw was burnt and some of the faggots. Park, J., was clearly of opinion that this was not a stack of wood within the meaning of the statute. A quantity of straw packed on a lorry left in the yard of an inn, on its way to market is not a stack of straw. *R. v. Satchwell*, L. R. 2 C. C. 21 ; 42 L. J., M. C. 63.

Proof of property set fire to—wood. In *R. v. Price*, 9 C. & P. 729, 38 E. C. L., under the repealed statute, 7 & 8 Geo. 4, c. 30, s. 17, the prisoners were charged with setting fire to a wood, and it appeared that they set fire to a summer-house which was in the wood, and that from the summer-house the fire was communicated to the wood. It was held, that they might be properly convicted. Setting fire to a single tree is not arson within this section ; *R. v. Davey*, 1 Cox, C. C. 60.

Proof of property set fire to—ships and vessels. A pleasure-boat, eighteen feet long, was thought by Patteson, J., not to be a vessel within the meaning of the 7 & 8 Geo. 4, c. 30, s. 9 ; *R. v. Bowyer*, 4 C. & P. 559, 19 E. C. L. Upon an indictment for setting fire to a barge, Alderson, B., said that, if the prisoner was convicted he would take the opinion of the judges, as to whether a barge was within the same statute ; but the prisoner was acquitted. *R. v. Smith*, 4 C. & P. 569, 19 E. C. L.

Setting fire to goods in a house. In *R. v. Lyons*, 28 L. J., M. C. 33, a question was raised whether a man could be indicted for setting *fire to goods in his own house with intent thereby to defraud [*295 an insurance company. The house was not set fire to. It was contended that as merely setting fire to a man's own house without any special intent was not felony at common law, nor was made so by any statute, setting fire to goods in a man's own house even with a fraudulent intent was not felony either, as the 14 & 15 Vict. c. 19, s. 3, only made it a felony to set fire to goods in a building, the setting fire to which is made felony by that or any other statute. But the court held that the conviction was good, as the offence charged clearly came within the true meaning and intention of the legislature, giving the section a reasonable construction. An opinion was, however, expressed in the

course of the argument, that the indictment ought to follow the words of the statute and expressly to state that the goods were set fire to in a building the setting fire to which was a felony, which was not done here; but the omission was not considered to be a ground for quashing the conviction. The terms of the present statute (24 & 25 Vict. c. 97, s. 7, *supra*, p. 286) are somewhat different.¹

The effect of the decision in *R. v. Lyons*, *supra*, has been very extraordinary. The statute in force at the time that that case was decided made it a felony to set fire to goods in any house the setting fire to which is felony, *e. g.*, a dwelling-house. Lyons' house, however, was his own property, and it would not be a felony to fire it unless with an intent to injure or defraud with respect to the house, of which there was no evidence. Pollock, C. B., said, "We think the offence is complete if there be a setting fire to the goods *under such circumstances as, if shown with respect to a house set on fire*, would render the setting fire to the house a felony. Here the intent to defraud is alleged with respect to the goods. The setting fire to the house with the like intent would be felony." Instead of adhering strictly to the language of Pollock, C. B., the present statute (s. 7, *ante*, p. 286) speaks of setting fire to goods under such circumstances that if *the building were thereby* set fire to the offence would amount to felony. It has accordingly been held that the jury must be asked, supposing the house caught fire, would it have been wilful and malicious firing, and if the jury negative any malice or recklessness with respect to the house, the prisoner cannot be convicted of the felony, notwithstanding that he set fire to the goods maliciously meaning to destroy them. The facts of the case were as follows: The prisoner from ill will to the prosecutrix broke up her chairs, tables, and other furniture, made a pile of them and her clothes on the stone floor of the kitchen of her lodgings, and lit them at the four corners so as to make a bonfire of them. The building would almost certainly have been burned in consequence had not the police, who were sent for, succeeded in extinguishing the bonfire. The learned judge (Blackburn, J.) directed the jury, if they thought the prisoner was aware of what he was doing, and that it would probably set the building on fire, or was at best reckless whether it did or not, they would find him guilty of the felony. The jury, however, found him "guilty, but not so that if the house had caught fire, the setting fire to the house would have been wilful and malicious." It was held that the conviction was bad, *R. v. Child*, L. R. 1 C. C. R. 307; 40 L. J., M. C. 127; *R. v. Vattrass*, 15 Cox, 73; *R. v. Harris*, 15 Cox, 75.

*296] ***When persons are considered as being in the house when set fire to.** A stable which adjoined a dwelling-house

¹ Firing one's own house to defraud insurer, is not arson. *Roberts v. State*, 7 Cold. 359. See *Shepherd v. People*, 19 N. Y. 537. S.

Under Nevada statute evidence of over assurance upon the goods of the accused, destroyed by fire, is competent. *State v. Cohn*, 9 Nev. 179.

was set on fire; the flames communicated to the dwelling-house, in which members of the family had been sleeping; but it did not appear whether the house took fire before they left the house or after. Alderson, B., in summing up the case to the jury, directed them to say by their verdict, should they find the prisoner guilty, whether the house took fire before the family were in the yard or after. If they were of opinion that it was after the family were in the yard, his lordship said that he thought they ought to acquit the prisoner of the capital charge, as to sustain that, in his opinion, it was necessary that the parties named in the indictment should be in the house at the very time the fire was communicated to it. But his lordship added that, the point being a new one, and of very great importance, he should not take upon himself to decide it there, but should reserve it for the decision of the judges. The prisoner was acquitted of the entire charge. *R. v. Warren*, 1 Cox, C. C. 68. In *R. v. Fletcher*, 2 C. & K. 215, 61 E. C. L., Patteson, J., held in a similar case that, if the fire caught the house after the inmates had left it, the charge could not be sustained.

Possession—how to be described. The house burned should be described as being in the possession of the person who is in the actual occupation, even though the possession be wrongful.¹ Thus where a laborer in husbandry was permitted to occupy a house as part of his wages, and after being discharged from his master's service, and told to quit the house in a month, remained in it after that period, it was held by the judges, upon an indictment for setting fire to the house, that it was rightly described as being in the possession of the laborer. *R. v. Wallis*, 1 Moody, C. C. 344.

Proof of malice and wilfulness. If the act of burning be done under a *bond fide* belief in the existence of a right to burn (as where a woman set fire to some furze on a common), there is no criminal offence. *R. v. Twose*, 14 Cox, C. C. 327. It must be proved that the act of burning was both wilful and malicious, otherwise it is only a trespass and not a felony; 1 Hale, P. C. 569. Therefore if A. shoot unlawfully at the poultry or cattle of B., whereby he sets the house of another on fire, it is not felony; for though the act he was doing was unlawful, he had no intention to burn the house; *Id.* In this case, observes Mr. East, it should seem to be understood that he did not intend to *steal* the poultry, but merely to commit a trespass; for otherwise, the first attempt being felonious, the party must abide all the consequences. 2 East, P. C. 1019. But where a sailor on board a ship entered the hold for the purpose of stealing the rum, and the rum coming in contact with a lighted match in his hand, the ship

¹ If it be in fact the dwelling-house, the court will not inquire into the tenure or interest of the occupant. *People v. Van Blaricum*, 2 Johns, 106. In an indictment for burning a public building, it is not necessary to allege who is its owner or occupant, and any such allegation, if made, is immaterial. *State v. Roe*, 12 Vt. 93. But see *Carter v. State*, 20 Wis. 647. S.

was set on fire and destroyed, it was held by the Court of Crown Cases Reserved in Ireland that a conviction for arson could not be upheld. *Reg. v. Faulkner*, 13 Cox, C. C. R. Ir. 550. See *ante*, p. 24. It is at least very doubtful whether the proposition laid down by Mr. East can now be considered law. See *post*, tit. "Murder," "Proof of malice, death ensuing from unlawful act." If A. has a malicious intent to burn the house of B., and without intending it burns that of C., it is felony. 1 Hale, P. C. 569; 2 East, P. C. 1019. So if A. command B. to burn the house of J. S., and he do so, and the fire burns also another house, the person so commanding is accessory to *297] the burning of the latter house. Plowd. 475; 2 East, P. C. 1019. So where the primary intention of the offender is only to burn his own house (which is no felony), yet if in fact other houses are thereby burned, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful, and the consequence immediately and necessarily flowing from the original act done, it is felony. 2 East, P. C. 1031. On an indictment for wilfully setting fire to a rick by firing a gun close to it, evidence was allowed to be given by Maule, J., with a view of showing that the fire was not accidental, that on a previous occasion the prisoner was seen near the rick with a gun in his hand, and that the rick was then also on fire. *R. v. Dossett*, 2 C. & K. 306, 61 E. C. L. Upon this point it was said by Tindal, C. J., in his charge to the grand jury at Bristol: "Where the statute directs, that to complete the offence it must have been done with intent to injure or defraud some person, there is no occasion that either malice or ill-will should subsist against the person whose property is destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and its necessary consequence must injure his neighbor, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him: nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief he committed was wider in its consequences than he originally intended." 5 Car. & P. 266 (n), 24 E. C. L.

But where two lads threw a lighted paper into a post-office letter-box, forming part of a house, whereby several letters were burnt, Williams, J., said, that no doubt if they intended the fire to do its worst they would be guilty, but if they only set fire to the letters, and it was contrary to their intention to burn the house, they would not be guilty, and would not be guilty even if the house had been burnt. *R. v. Batstone*, 10 Cox, 20.

In *R. v. Gray*, 4 F. & F. 1102, evidence of other claims on other insurance companies in respect of fires, in other houses previously

occupied by the prisoner, was admitted to show that the fire in question was not the result of accident.

A woman indicted for arson, with intent to defraud an insurance office, was allowed to give evidence that she was in easy circumstances, and so had no pecuniary motive for the crime. *R. v. Grant*, 4 F. & F. 342 (Pollock, C. B). See, too, *R. v. Harris*, 4 F. & F. 342, and *supra*, p. 102.

As to malice against the owner of the property being unnecessary, see 24 & 25 Vict. c. 97, s. 58, *supra*, p. 289.

Proof of the intent. The intent to injure or defraud is an important ingredient in this offence. But like the proof of malice and wilfulness, it will generally be assumed.¹ Thus where a man was indicted for setting fire to a mill (43 Geo. 3, c. 58, s. 1, repealed), with intent to injure the occupier thereof, and it appeared from the prosecutor's evidence, that the prisoner was an inoffensive man, and never *had any quarrel with the occupier, and that there was no known motive for committing the act; the judges held the conviction right, for that a party who does an act wilfully, necessarily intends that which must be the consequence of his act. *R. v. Farrington*, Russ. & Ry. C. C. 207; *R. v. Philp*, 1 Moo. C. C. 263. [298

But it was held that, on an indictment under the repealed statute, 7 Will. 4 & 1 Vict. c. 89, s. 2, for the capital offence of setting fire to a dwelling-house, some person being therein, in which there was no charge of any intent to injure or defraud any person, the prisoner could not be convicted of the transportable offence of setting fire to the house, under the 3d section of the statute, as an allegation of intent to injure or defraud some person was essential to an indictment under that section. *R. v. Paice*, 1 C. & K. 73, 47 E. C. L. But now no intent to injure any particular person need be alleged in the indictment, see 24 & 25 Vict. c. 97, s. 60, *ante*, p. 289, and see *R. v. Newbould*, L. R. 1 C. C. R. 344; 41 L. J., M. C. 63.

Where the prisoner was a person of weak intellect, and the jury found that, though the prisoner set fire to the building as charged, they did not believe that he was conscious that the effect of what he did would be to injure any person, *Martin, B.*, ordered a verdict of not guilty to be entered. *R. v. Davies*, 1 F. & F. 69.

It has been held, that a wife who set fire to her husband's house was not guilty of felony, within the repealed statute 7 & 8 Geo. 4, c. 30, s. 2. The indictment described the prisoner as the wife of J. Marsh, and charged her with setting fire to a certain house of the said J. Marsh, with intent to injure him, against the statute. It appeared that the prisoner and her husband had lived separate for about two years, and previous to the act, when she applied for the candle with which it was done, she said it was to set her husband's house on fire,

¹ Thus previous attempts to burn may be shown as evidence of the intent of the prisoner in subsequently setting fire to the house *Shainwold v. People*, 51 Cal. 468. Also threats by the defendant to burn the same building. *State v. Fenlason*, 78 Me. 435.

because she wanted to burn him to death. On a case reserved upon the question, whether it was an offence within the 7 & 8 Geo. 4, c. 30, s. 2 (repealed), for a wife to set fire to her husband's house for the purpose of doing him a personal injury, the conviction was held wrong, the learned judges thinking, that, to constitute the offence, it was essential that there should be an intent to injure or defraud some third person, not one identified with herself. *R. v. Marsh*, 1 Moody, C. C. 182. See as to the effect of the Married Women's Property Act, 1882, *post*, tit. "General Matters of Defence—Coercion."

Where the intent laid is to defraud insurers, the insurance must be proved. To prove this the policy must be produced; evidence of the books of an insurance company not being admissible, unless notice has been given to produce the policy, or the non-production of the policy is accounted for. *R. v. Doran*, 1 Esp. 126. The policy is not inadmissible for want of a stamp; 33 & 34 Vict. c. 97, s. 17 (*ante*, p. 180). And it must be shown that the risk has attached. It has been held that the part-owner of a ship may be convicted of setting fire to it with intent to injure and defraud the other part-owners, although he has insured the whole ship, and promised that the other part-owners shall have the benefit of the insurance. *R. v. Philp*, 1 Moo. C. C. 262; *R. v. Newill*, *Id.* 458. A person may be convicted under the 7 Will. 4 & 1 Vict. c. 89, ss. 6 & 11 (repealed), for setting fire to a vessel of which he was at the time part-owner. *R. v. Wallace*, Car. & M. 200. The underwriters on a policy of goods fraudulently made are within the statute; s. c. 2 Moo. C. C. 200.

Where a count in an indictment under the 7 & 8 Geo. 4, c. 30, *s. 17 (repealed), charged the prisoner with setting fire to a
*299] certain stack of straw, but without alleging any intent to injure, the judges held that as that clause contained no words of intent, the count was good. *R. v. Newill*, 1 Moo. C. C. 458. As to how the intent is to be laid, see 24 & 25 Vict. c. 97, s. 60, *supra*, p. 289.

What constitutes an attempt to set fire. It is a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack under this statute, if he go to the stack with the intention of setting fire to it, and light a lucifer match for that purpose, but abandon the attempt because he finds that he is being watched. *Per Pollock*, C. B., *R. v. Taylor*, 1 F. & F. 511. See further, *infra*, p. 313.

*ASSAULT.

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Impeding a person endeavoring to save himself or others from shipwreck. By the 24 & 25 Vict. c. 100, s. 17, "whosoever shall unlawfully and maliciously prevent or impede any person being on board of, or having quitted, any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavor to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavor to save the life of any such person, as in this section first aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be * kept in penal servitude for life, or for any term not less than [*301 three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Shooting or attempting to shoot, or wounding with intent to do grievous bodily harm. By s. 18, "whosoever shall unlawfully and

maliciously by any means whatsoever wound, or cause any grievous bodily harm to any person, or shoot at any person, or by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms, at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony." The same punishment as in the last section.

What shall constitute loaded arms. By s. 19, "any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this act, although the attempt to discharge the same may fail from want of proper priming or from any other cause."

Inflicting bodily injury with or without weapon. By s. 20, "whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Attempting to choke, in order to commit any indictable offence. By s. 21, "whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

In addition to the punishment here awarded the court may order the offender, if a male, to be once, twice, or thrice privately whipped. See 26 & 27 Vict. c. 44.

Assaults on clergymen. By s. 36, "whosoever shall by threats or force obstruct or prevent, or endeavor to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil
*302] *process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or

to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same, or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

Assaults on magistrates and other officers endeavoring to save shipwrecked property, etc. By s. 37, it is enacted, "whosoever shall assault and strike, or wound any magistrate, officer, or other person whatsoever lawfully authorized, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Assault with intent to commit felony, or on officer in execution of duty, or to resist lawful apprehension. By s. 38, "whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor." By the 34 & 35 Vict. c. 112, s. 12, where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this act, and shall, in the discretion of the court, be liable either to pay a penalty not exceeding £20, and in default of payment to be imprisoned, with or without hard labor, for a term not exceeding six months, or to be imprisoned for any term not exceeding six months, or in case such person has been previously convicted of a similar assault within two years, nine months, with or without hard labor.¹

Assaults with intent to obstruct sale or passage of grain. By s. 39, "whosoever shall beat, or use any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling or otherwise disposing of, or to compel him to buy, sell or otherwise

¹ In an indictment against one for impeding an officer in the execution of his official duty, the allegation must show the nature of the duty, the manner of its execution, and the mode of resistance. *State v. Burt*, 25 Vt. 373; *People v. Gulick*, Hill & Denio, 229. Resistance to a warrant valid on its face is indictable even if the complaint was not sufficient to authorize the issuing of a warrant. *United States v. Tinklepaugh*, 3 Blatch. C. C. 425. S.

dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use any such violence or threat to any person having the care or charge of any wheat or other grain, flour, meal, malt, or potatoes, whilst on the way to or from any city, market town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labor in the common gaol or house of correction for any term not exceeding three months: provided that no person who shall be punished *303] *for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever."

Assaults on seamen. By s. 40, "whosoever shall unlawfully and with force hinder or prevent any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat or use any violence to any such person with intent to hinder or prevent him from working at or exercising the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labor in the common gaol or house of correction for any term not exceeding three months; provided that no person who shall be punished for any offence by reason of this section shall be punished for the same offence by virtue of any law whatsoever."

Assaults punishable by summary conviction—when a bar to further proceedings. By ss. 42, 43, power is given to justices to punish summarily any common assault or assaults on females or on boys under fourteen years of age; and by s. 44, to dismiss the complaint and make out a certificate under their hands stating the fact of such dismissal; and by s. 45, "if any person, against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labor awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause;" and see *post*, p. 300.

Assault occasioning bodily harm. By s. 47, "whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor." A similar provision is also contained in s. 20.

Common assault. By the same section, "whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor."

Indecent assaults on females. By s. 52, "whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

Indecent assaults on males. By s. 62, "whosoever shall attempt to commit the said abominable crime (buggery), or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years *and not less than three [now five] years, or to be imprisoned for [*304 any term not exceeding two years, with or without hard labor.]"

Prosecution for assault by guardians or overseers. By s. 73, provision is made for the prosecution of assaults upon young persons under the age of sixteen years. See *infra*, tit. "Ill-treating Apprentices."

Costs. See as to costs, 24 & 25 Vict. c. 100, ss. 74 & 75, *supra*, pp. 242, 243.

Assault with intent to rob. See 24 & 25 Vict. c. 96, ss. 41, 42, 43; *post*, tit. "Robbery."

Assaults arising from combination. See 38 & 39 Vict. c. 86, s. 7, tit. "Conspiracy in Restraint of Trade."

Judicial separation in cases of assault. The 41 Vict. c. 19, giving power to the court to order judicial separation in the case of a husband convicted of an aggravated assault has been referred to, *ante*, p. 229.

What amounts to an assault. All crimes of violence to the person include an assault, and the nature of the crime depends much more frequently on the consequences of the act than any peculiarity of the act itself. The decisions on the various crimes of violence will, therefore, frequently serve to illustrate the principles applicable to all. These cases are ranged under the heads of the crimes to which they refer.

An assault is an attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, as by striking at him, or even holding up the fist to him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of actual violence against his person, as by pointing a weapon at him when he is within the reach of it.¹ 1 East, P. C. 406. Striking at another

¹ 1 Wheel. C. C. 365; *United States v. Ortega*, 4 Wash. C. C. 534; *State v. Davis et al.*, 1 Hill, 46; *State v. Beck et al.*, Id. 363. It is an assault to attempt to run against

with a cane, stick, or fist, although the party striking misses his aim, 2 Roll. Abr. 545 l. 45; drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a gun at a man who is within the distance to which the gun will carry; pointing a pitchfork at him when within reach of it; or any other act, indicating an intention to use violence against the person of another, is an assault. 1 Hawk. c. 62, s. 1. It is an assault to point a loaded pistol at any one; but not an assault to point at another a pistol which is proved

the wagon of another on the highway. *People v. Lee*, 1 Wheel. C. C. 364. It is not an assault to point a cane at one in the street in derision, and for the purpose of insult, but without an intention to strike. *Goodwin's Case*, 6 Rog. Rec. 9. If a pistol, purporting to be loaded, was presented so near as to have been dangerous to life if it had been loaded and gone off, it is an assault, though in fact the pistol was not loaded. *State v. Smith*, 2 Humph. 457. It is not an assault to cause abortion upon a woman not yet quick with child, if done with her consent. It is only in cases of high crimes that the person assaulted is incapable of assenting. *State v. Cooper*, 2 Zab. 52; *Bell v. Miller*, 5 O. 250. An assault is an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such injury, accompanied with circumstances denoting an intent, coupled with a present ability, to use violence against the person. It is not essential, to constitute an assault, that there should be a direct attempt at violence. *Hays v. People*, 1 Hill, 351. [An indictment for assault with intent to murder is sustained by showing that the assault was made by a third person, and defendant was simply present aiding and abetting. *Mills v. State*, 13 Tex. App. 437.] An offer to strike by one person rushing upon another, will be an assault, though the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will instantly receive a blow, unless he strikes in self-defence. *State v. Davis*, 1 Ired. Law, 125. Where A. being within striking distance raises a weapon for the purpose of striking B., and at the same time declares that if B. will perform a certain act, he will not strike him, and B. does perform the required act, in consequence of which no blow is given, this is an assault on A. *State v. Morgan*, 3 Ired. Law, 186. Assault by drawing an empty pistol and threatening to shoot. *State v. Smith*, 2 Humph. 457. The drawing of a pistol without presenting or cocking it is not an assault. *Lawson v. State*, 30 Ala. 14; *State v. Shepard*, 10 Ia. 126; *Bloomer v. State*, 3 Sneed, 66; *Commonwealth v. Ford*, 5 Gray, 475. [Nor is it an assault to point an unloaded gun at any one. *Chapman v. State*, 78 Ala. 463, but see *Commonwealth v. Dosch*, 2 Pa. Sup. Ct. Dig. 23.]

For other cases of assaults with pistols, see *Commonwealth v. McLaughlin*, 5 Allen, 507; *State v. Myerfield*, 1 Phil. (Law) 108; *Warren v. State*, 33 Tex. 517; *State v. Church*, 63 N. C. 15; *Tarver v. State*, 43 Ala. 354; *Robinson v. State*, 31 Tex. 170. S.

Where a pistol is discharged in a crowded car in a spirit of frolic, the law will imply malice. *Smith v. Commonwealth*, 12 W. N. Cases, (Pa.) 196. Carrying concealed weapons does not appear to be itself an indictable offence in England. Although where a man arms himself in such a manner as will naturally cause a terror to the people it is an offence at common law. Thus, "every one commits a misdemeanor who goes armed in public without lawful occasion in such a manner as to alarm the public." *Stephen Dig. C. L. art. 68*, citing 2 Edw. 3, c. 3. By statutes in various States the wearing of concealed weapons has been prohibited. *Wharton Crim. Law*, 9th ed. § 1557. A partially concealed weapon is within the statute. *State v. Bias*, 37 La. An. 259. The indictment must conform to the statutes, but the words "did have about his person" may be substituted for "did carry." *State v. Carter*, 36 Tex. 89. The indictment need not allege that a dance was going on in a ball-room, nor that the parties were human beings. *Owens v. State*, 3 Tex. App. 404. Where the statute makes certain exceptions to the prohibition, it is matter of defence. The State need not prove the non-existence of the exceptions. *Wiley v. State*, 52 Ind. 516; *Beasley v. State*, 5 Lea, (Tenn.) 705. Nor even negative them in the indictment unless they are part of the definition of the offence. *Jenkins v. State*, 36 Tex. 638. A provision for the forfeiture of the weapon is unconstitutional. *Jennings v. State*, 5 Tex. App. 298; *Leatherwood v. State*, 6 Tex. App. 244. See generally, *Brewer v. State*, 6 Baxter, (Tenn.) 446; *Miller v. State*, Id. 449; *State v. Judy*, 60 Ind. 138; *Snell v. State*, 4 Tex. App. 171; *Summerlin v. State*, 3 Tex. App. 444.

not to be so loaded as to be able to be discharged. *R. v. James*, 1 C. & K. 530, 47 E. C. L. But in *R. v. St. George*, 9 C. & P. 483, 38 E. C. L., Parke, B., held otherwise, saying that it was an assault to present a pistol at a man at all, whether loaded or not. Considerable doubt has been thrown on this decision by the case of *R. v. Brown*, 10 Q. B. D. 381; 52 L. J., M. C. 49. See *post*, "Attempt to Murder."¹ Although to constitute an assault there must be a present ability to inflict an injury, yet if a man is advancing in a threatening attitude to strike another, so that the blow would almost immediately reach him if he were not stopped, and he is stopped, this is an assault. *Stephens v. Myers*, 4 C. & P. 349, 19 E. C. L. So there may be an assault by *exposing a child of tender years, or a person under the control and dominion of the party, to the inclemency of the weather. [*305 *R. v. Ridley*, 2 Camp. 650; 1 Russ. Cri. 959, 5th ed. Where the defendants took a newly-born child, put it into a bag, and hung it on to some park palings at the side of a footpath, Tindal, C. J., held this to be an assault upon the child. See *R. v. Marsh*, 1 C. & K. 496, 47 E. C. L.

But a mere omission to do an act cannot be construed into an assault. Thus where a man kept an idiot brother, who was bed-ridden, in a dark room in his house, without sufficient warmth or clothing, Burrough, J., ruled, that these facts would not support an indictment for assault and false imprisonment; for although there had been negligence, yet mere omission, without a duty, would not create an offence indictable as an assault. *R. v. Smith*, 2 C. & P. 439, 12 E. C. L.

It was formerly held that, if a person puts a deleterious drug (as cantharides) into coffee, in order that another may take it, if it be taken, he is guilty of an assault upon the party by whom it is taken. *R. v. Button*, 8 C. & P. 660, 34 E. C. L. But in *R. v. Hanson*, 2 C. & K. 912, 61 E. C. L., the contrary was held, *per Williams and Cresswell, JJ.*; and *R. v. Walkden*, 1 Cox, C. C. 282, *per Parke, B.*, and *R. v. Dilworth*, 2 Mood. R. 531, *per Coltman, J.*, are to the same effect. Nevertheless if death ensued, it would be manslaughter. 2 Hale, P. C. 436. See also 24 & 25 Vict. c. 100, s. 24, *infra*, tit. "Poisoning."

An unlawful imprisonment is also an assault. 1 Hawk. c. 62, s. 1.

It has been frequently said that every imprisonment includes a battery. B. N. P. 22; 1 Selw. N. P. Imprisonment, I. But this doctrine has been denied. *Emmett v. Lyne*, 1 N. R. Bos. & P. 255.

If two parties go out to strike one another, and do so, it is said to be an assault in both, and that it is quite immaterial which strikes the first blow. *R. v. Lewis*, 1 C. & K. 419, 47 E. C. L. See *infra*, p. 306. "The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but

¹ Where D. was convicted for felonious assault, on petition for allowance of writ of error, on the ground that the evidence clearly showed that the pistol used by D. was so charged that it was impossible to fire it off, the petition was refused. *Commonwealth v. Dosch*, 2 Pa. Sup. Ct. Dig. 23.

that, a blow struck in sport, and not likely or intended to cause bodily harm, is not an assault, and that, an assault, being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling does not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Reg. v. Orton*, 39 L. T. 293." *Per Cave, J.*, in *R. v. Coney*, 8 Q. B. D. 539.

Although it was formerly doubted, it is now clear, that no words, whatever nature they may be of, will constitute an assault. *Hawk. P. C. b. 1, c. 62, s. 1*; 1 *Bac. Ab. Assault and Battery (A)*; 1 *Russ. Cri. 956, 5th ed.* But words may sometimes be an important ingredient in ascertaining what is the intention of the party; thus they may qualify what would otherwise be an assault, by showing that the party intends no present corporal injury, as where a person meeting another laid his hand upon his sword, saying, "If it were not assize time I would not take such language from you;" for it shows that he had not a design to do the party any corporal hurt.¹ *Tuberville v. Savage*, 1 *Mod. 3*; 2 *Keb. 545*.

As to what participation in a prize-fight will constitute an assault as aiding and abetting in such fight, see *R. v. Coney*, 8 Q. B. D. 534; 51 L. J., M. C. 66, where the majority of the Court of Crown Cases *306] *Reserved held that a spectator could not be held guilty by being merely present.

Consent. In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to on the part of the person who is the subject of the act. But on examination it will be found that there is no authority for such a position. Thus in *R. v. Nicols*, *Russ. & Ry. 130*, which is sometimes quoted in support of such a doctrine, where a master took indecent liberties with a female scholar to which she did not resist, Mr. Baron Graham distinctly told the jury that there was some evidence to show that the acts of the prisoner were against the girl's will. And in *R. v. Day*, 9 C. & P. 722, 38 E. C. L., a similar case, Coleridge, J., pointed out the distinction between *consent* and *submission*. He said, "every consent in-

¹ *Commonwealth v. Eyre*, 1 S. & R. 347. When the defendant, at the time he raised his whip and shook it at plaintiff, though within striking distance, made use of the words, "Were you not an old man, I would knock you down," this does not import a present purpose to strike, and does not in law amount to an assault. *State v. Crow*, 1 *Ired. Law, 376*. Threatening words and violent and menacing gestures, if unaccompanied by a present intention to do a corporal injury, do not amount to an assault, and the question of intention is to be determined by the jury upon consideration of all the facts and circumstances in proof. *Smith v. State*, 39 *Miss. 521*. See generally in what cases threats do or do not constitute an assault. *People v. Yslas*, 27 *Cal. 630*; *People v. Bransby*, 32 *N. Y. 525*; *State v. Mooney*, 1 *Phil. (Law) 434*; *Balkum v. State*, 40 *Ala. 671*; *State v. Hull*, 34 *Conn. 132*; *Commonwealth v. Hurley*, 99 *Mass. 433*; *Mitchell v. State*, 41 *Ga. 527*; *State v. Rawles*, 65 *N. C. 334*; *State v. Vannoy*, *Id. 532*. S.

volves a submission ; but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting ; on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law." So where two boys of eight years of age were ignorant of the moral nature of the act done to them it was held that mere submission to an indecent act was not consent. *R. v. Lock*, 42 L. J., M. C. 5 ; L. R. 2 C. C. R. 10. It is otherwise if they willingly and intentionally consent. *R. v. Wollerston*, 12 Cox, C. C. R. 180. In *R. v. Martin*, 2 Moo. C. C. 123, where the prisoner was convicted of an assault with intent to carnally know a girl above ten and under twelve years of age, the girl assenting, the judges, on a case reserved, held that the conviction could not be supported ; see also *R. v. Read*, 1 Den. C. C. 377 ; 2 C. & K. 927, 61 E. C. L. ; and *R. v. Johnson*, 1 L. & C. 632 ; 34 L. J., M. C. 192 ; but girls under the age of thirteen are now protected in cases of carnally knowing by the provisions of the 38 & 39 Vict. c. 94, ss. 3, 4 ; and the consent of young persons under that age to an indecent assault is no defence under 43 & 44 Vict. c. 45. See *post*, tit. " Rape."

If the consent of the injured person has been obtained by fraud, then the outrage is considered as not the less an assault because it is consented to. Thus in *R. v. Saunders*, 8 C. & P. 265, 34 E. C. L., where a man pretending to be her husband, went to bed with a married woman, and she, believing him to be her husband, permitted him to have connection with her ; this was held by Gurney, B., to be an assault. And the same was held by Alderson, B., in *R. v. Williams*, Id. 286. See also *R. v. Case*, 1 Den. C. C. 580 ; *R. v. Bennett*, 4 F. & F. 1105 ; *R. v. Flattery*, 9 Q. B. D. 410 ; 46 L. J., M. C. 130 ; *R. v. Young*, 14 Cox, C. C. R. 114 ; *Hegarty v. Shine*, 14 Cox, C. C. Ir. 124, 145 ; and *post*, tit. " Rape."

It has also been said, though the law is not so clear upon this point, that where the act is in itself unlawful, it will, though consented to, be punishable as an assault. Coleridge, J., in *R. v. Lewis*, 1 C. & K. 419, 47 E. C. L., said, that if two parties go out to strike one another, and do so, that it was an assault in both, and that it was quite immaterial who struck the first blow.¹ And see *per* Cave, J., in *R. v. Coney*, *ante*, p. 305. It is indeed said in Buller's N. P. 16, that in an action for assault and battery, it is no defence that the plaintiff *and defendant fought by consent, for that the fighting [*307

¹ An indictment against A. for an assault and battery upon B. is not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs by agreement between them. An assault and battery and an affray are distinct offences. *Champer v. State*, 14 O. St. 437. See *State v. Dinsen*, 10 Minn. 407. S.

By Indiana code a conviction for an assault with intent, etc., will be sustained, although the indictment is for assault and battery with intent, and there is evidence of assault only, not battery. *Dickinson v. State*, 70 Ind. 247 ; *Powers v. State*, 87 Ind. 144 ; *Subert v. State*, 95 Ind. 471 ; *State v. Fisher*, 103 Ind. 530 ; *State v. Keeling*, 107 Ind. 563. On consent in rape, or assault with intent to commit rape, see *State v. Burgdorf*, 53 Mo. 65.

being unlawful, the plaintiff would still be entitled to a verdict for the injury done him. But in *Christopherson v. Bare*, 17 L. J., Q. B. 109, the Court of Queen's Bench held that a plea of leave and licence to an action of assault, amounted to a plea of not guilty. *R. v. Knock*, 14 Cox, C. C. 1.

Lawful chastisement. If a parent in a reasonable manner chastise his child, or a master his servant, being actually his servant at the time, or a schoolmaster his scholar, or a gaoler his prisoner, or if one confine a friend who is mad, and bind and beat him, in such circumstances it is no assault.¹ Hawk. P. C. b. 1, c. 90, s. 23: Com. Dig. Pleader (3 M. 13). A defendant may justify even a *mayhem*, if done by him as an officer of the army for disobedience of orders, and he may give in evidence the sentence of a council of war, upon petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favor of the defendant. *Lane v. Degberg*, B. N. P. 19. In all cases of chastisement it must, in order to be justifiable, appear to have been reasonable. 1 East, P. C. 406; and the law as above stated with respect to children is said to have reference only to such children as are capable of appreciating correction, and not to infants only two and-a-half years old. *R. v. Griffin*, 11 Cox, C. C. 402, *per* Martin, B., after consulting with Willes, J.; and see *post*, tit. "Murder."

Self-defence. A blow or other violence necessary for the defence of a man's person against the violence of another, will not constitute a battery. Thus, if A. lift up his stick, and offer to strike B., it is a sufficient assault to justify B. in striking A.; for he need not stay till A. has actually struck him. B. N. P. 18. But every assault will not justify every battery, and it is a matter of evidence whether the assault was proportionable to the battery; an assault may indeed be of such a nature as to justify a *mayhem*; but where it appeared that A. had lifted the form upon which B. sat, whereby the latter fell, it was held no justification for B.'s biting off A.'s finger. B. N. P. 18. In cases of assault, as in other cases of trespass, the party ought not, in the first instance, to beat the assailant, unless the attack is made with such violence as to render the battery necessary. *Weaver v. Bush*, 8 T. R. 78; 1 Russ. 965, 5th ed. Where a man strikes at another within a distance capable of the latter being struck, he is justified in using such a degree of force as will prevent a repetition. *Per* Parke, B., *Anon.*, 2 Lewin, C. C. 48. But a blow struck after all danger is

¹ A master has no right to correct his hired servant. *Commonwealth v. Baird*, 1 Ash. 267. The authority of the master to correct his apprentice is personal. *People v. Phillips*, 1 Wheel. C. C. 159. As to the case of a schoolmaster, see *Morris's Case*, 1 Rog. Rec. 53; *Commonwealth v. Randall*, 4 Gray, 36. Of an assault by a parent on a child. *Jacob v. State*, 3 Humph. 493; *Johnson v. State*, 2 Id. 283; *State v. Bitman*, 13 Ia. 485. A child of the age of nine years is incapable of giving a valid assent to a forcible transfer of him by a stranger from the legal custody of his father to the custody of his mother, who had no right thereto; and evidence of such assent is incompetent in defence to an indictment for an assault and battery upon him. *Commonwealth v. Nickerson*, 5 Allen, 518. S.

past, is an assault. *R. v. Driscoll*, Car. & M. 214, 41 E. C. L., *per Coleridge, J.* If the violence used be more than necessary to repel the assault, the party may be convicted of an assault. *R. v. Mabel*, 9 C. & P. 474, 38 E. C. L.

The rule on this point is well laid down by a writer on Scotch law: "Though fully justified in retaliating, the party must not carry his resentment to such a length as to become the assailant in his turn, as by continuing to beat the aggressor after he has been disabled, or has submitted, or by using a lethal or ponderous weapon, as a knife, poker, hatchet or hammer, against a fist or cane, or in general pushing his advantage, in point of strength or weapon, to the uttermost. In such cases the defence degenerates into aggression, and the original assailant is entitled to demand punishment for the *new assault* *committed on him, after his original attack had been duly chastised.¹ *Alison's Princ. Cr. Law of Scot.* 177; 1 Hume, [*308 335.

On a trial for murder of a wife by her husband, evidence that the wife had on other occasions tried to strangle him with his neckerchief, was allowed to be given in order to show the character of the assault he had to apprehend. It appeared from the evidence that the prisoner was very sensitive about the neck from old abscesses, and that the wife on several occasions had twisted his neckerchief round his neck until he became black in the face. *R. v. Hopkins*, 10 Cox, C. C. 229.

Defence of other persons. It would seem that a person has no right to commit an assault merely in defence of other persons, unless he stand in a particular relation to the person assaulted. Such relations are, husband and wife, and *vice versa*; parent and child, and *vice versa*; and a servant in defence of his master, but not a master in defence of his servant.² The law is so laid down in Dalton's Justice, ch. 121; though he treats the last point as doubtful. He also says that neither can the farmer or tenant justify such an act in defence of his landlord, nor a citizen in defence of the mayor of the city or town corporate where he dwelleth. Hawkins, bk. 2, c. 60, s.

¹ *State v. Wood*, 1 Bay, 282; *Elliott v. Brown*, 2 Wend. 497. The law does not justify any assault by way of retaliation or revenge for a blow previously received. *State v. Gibson*, 10 N. C. 214. [Where self-defence is set up, the defendant must prove it by a preponderance of evidence. *State v. Jones*, 20 W. Va. 764. Evidence of previous threats of personal violence is inadmissible. *State v. Skidmore*, 87 N. C. 509. So also is the character of the person assaulted or abusive words used by him, where the defendant was the aggressor. *Brown v. State*, 74 Ala. 42; or unless the violent character of the injured person is in some way connected with the prisoner. *State v. Saunders*, 37 La. An. 389.] Proof that the prosecutor struck the first blow will not justify an enormous battery. *State v. Quin*, 3 Brev. 515. *San assault demerit* is no excuse, if the retaliation by the defendant be excessive and bears no proportion to the necessity or provocation received. *Cotton v. State*, 4 Tex. 260; *Gallagher v. State*, 3 Minn. 270. See *State v. Barwell*, 63 N. C. 661; *State v. Herrington*, 21 Ark. 195; *Harrison v. Harrison*, 43 Vt. 417; *State v. Bryson*, 1 Winst. 86; *State v. Lawry*, 4 Nev. 161; *Corey v. People*, 45 Barb. 262. *S. Gizler v. Witzel*, 82 Ill. 322.

² *Sharp v. State*, 19 O. 379. A man cannot justify in defence of his concubine. *Parker v. State*, 31 Tex. 132. A master may do that to protect his apprentice which another person could not do, without being an assailant or giving provocation for an assault. *Orten v. State*, 4 Greene, 140. *S.*

4, follows Dalton exactly. It is true that both these writers are speaking of the forfeiture of recognizances to keep the peace, but probably what is said would be applicable to prosecutions for assaults also.

Whether the interference can be justified on the ground that a breach of the peace is being committed, see *infra*.

Prevention of unlawful acts. There can be no doubt that any person may interfere to prevent the commission of a felony or any breach of the peace, and that he may proceed to any extremity which may be necessary to effect that object; commencing of course with a request to the offender to desist, then if he refuses gently laying hands on him to restrain him; and if he still resist, then with force compelling him to submit. Precisely the same rules apply as in cases of self-defence, it being in every case a question for the jury whether or no the degree of force actually used was necessary for the object which renders it legitimate; if there be any excess the party using it will be guilty of an assault.

It has been attempted in some cases to draw a distinction between laying hands upon a person in order to restrain him, and proceeding to use force in order to attain that object. *Seward v. Barclay*, 1 Ld. Raym. 62; 1 Hawk, c. 60, s. 33; but there seems no ground for such a distinction; the slightest imposition of hands if not justified is an assault; and the necessity of a greater or less degree of violence depends on the circumstances of the case, to be judged of by the jury.

Whether the assault may be carried to the extent of depriving the offending party of his life may perhaps be doubtful. See *post*, tit. "Murder."

There does not seem any express authority that to prevent any unlawful act other than a felony or breach of the peace an assault may be committed, and it may perhaps be doubtful whether an assault can be justified on this ground.

Of course the right to apprehend persons who have committed *309] *offences stands on a different footing. As to this see *supra*, tit. "Apprehension."

A man may justify an assault in defence of his house or other property even though no felony or breach of the peace is threatened.¹ 2 Roll. Abr. 549. And if the trespasser use force, then the owner may oppose force to force. *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 T. R. 78.

Proof of the aggravating circumstances. The aggravating circumstances frequently consist in the intent. Sometimes, however, the

¹ The force used must not exceed the necessity of the case. *Baldwin v. Haydon et al.*, 6 Conn. 453; *State v. Lazarus*, 1 Rep. Const. Ct. 34; *Watrous v. Steel*, 4 Vt. 629; *Shain v. Markham*, 4 J. J. Marsh. 577. It is a good defence, to an indictment for an assault and battery, that the defendant struck the prosecutor to prevent his taking away the defendant's goods and chattels, the prosecutor professing to seize them as a constable, by virtue of an execution, but not having been lawfully appointed a constable. *State v. Briggs*, 3 Ired. 357; *Commonwealth v. Goodwin*, 3 Cush. 154; *State v. Gibson*, 10 Ired. 214. S.

consequences alone are sufficient to subject the prisoner to the more serious punishment; thus a man who commits an assault, the result of which is to produce grievous bodily harm, is liable to be convicted under s. 47 of the 24 & 25 Vict. c. 100, *ante*, p. 303, though the jury think that the grievous bodily harm formed no part of the prisoner's intention.¹ *R. v. Sparrow*, 30 L. J., M. C. 43.

On an indictment for an assault occasioning actual bodily harm, and charging in other counts an unlawful wounding and the infliction of grievous bodily harm, a conviction may be had for a common assault. *R. v. Yeadon*, 1 L. & C. 85. See also *R. v. Guthrie*, *post*, tit. "Rape;" and this is so notwithstanding the word "assault" does not occur in the indictment.² *R. v. Taylor*, L. R. 1 C. C. 194; 38 L. J., M. C. 106.

On an indictment for feloniously cutting, stabbing, or wounding, the jury may find a verdict of guilty of the misdemeanor of unlawfully wounding, under the 14 & 15 Vict. c. 19, s. 5. See *post*, tit. "Wounding."

Subsequent proceedings after complaint for a common assault. By the 24 & 25 Vict. c. 100, ss. 44, 45, 46, *ante*, p. 303, three alternatives are given to justices with respect to charges of assault over which they have jurisdiction; they may convict the defendant, or they

¹ *Norton v. State*, 14 Texas, 387. S.

² As to assaults with intent to murder or commit bodily harm, see *Sharp v. People*, 29 Ill. 464; *White v. State*, 13 O. St. 569; *Ortan v. State*, 4 Greene, 140; *State v. Fee*, 19 Wis. 562; *Monday v. State*, 32 Ga. 672; *State v. Newberry*, 26 Ia. 467. [Where an unauthorized party attempted to make an arrest and in the attempt was cut by the accused, the authority to arrest was a material question and should have been specially charged upon. *Johnson v. State*, 5 Tex. App. 43.] A party indicted for an assault with intent to rob may be convicted of a simple assault. *Dickerson v. Commonwealth*, 2 Bush, 1. Under an indictment for an assault and battery, the jury may convict of an assault only. *Lewis v. State*, 33 Ga. 131. In an indictment against several for an assault and battery, some may be convicted of an assault and some of an assault and battery. *White v. People*, 32 N. Y. 465. An indiscriminate assault upon several persons is an assault upon each. *State v. Merritt*, 1 Phil. (Law) 134. Upon an information for an assault with intent to commit rape, the respondent may be convicted upon proof that a rape was actually committed. *State v. Smith*, 43 Vt. 324. An indictment for an assault and battery upon a person to the jury unknown is sustained by evidence before the petit jury, disclosing the name of the person assaulted. It is the ignorance of the grand jury and not of the petit jury which authorizes the statement that the person is unknown. *White v. People*, 32 N. Y. 465. S.

Wherever the offence would have been murder had death ensued from the stroke, it is immaterial what weapon is used. A verdict of assault with intent to kill is not contrary to evidence that the weapon used was a stick. *Tatum v. State*, 59 Ga. 638. See *Wilson v. State*, 4 Tex. App. 637; *Bingham v. State*, 6 Tex. App. 169; *Ferguson v. State*, 6 Tex. App. 504; *State v. Painter*, 67 Mo. 84. Where there is evidence that the wound was given under such circumstances as to mitigate the offence from murder the defendant is entitled to an instruction to the jury to that effect. *Agee v. State*, 64 Ind. 340. But heat of blood does not rebut the presumption of malice. *Commonwealth v. Scanlan*, 2 County Ct. Rep. (Pa.) 605. And the law will imply malice from an unlawful act. *Smith v. Commonwealth*, 100 Pa. St. 324. In indictments of assault with intent, etc., the felonious intent is of the essence of the offence, and the court invades the province of the jury in instructing them to infer the intent from any facts not including the whole evidence. *Simpson v. State*, 59 Ala. 1. It is error for the court to omit to instruct the jury on the law of self-defence, when there is evidence upon that point. *Edwards v. State*, 5 Tex. App. 593.

may dismiss the charge, or they may direct the party to be indicted. In *R. v. Walker*, 2 Moo. & R. 446, it was held, on the similar words of the 9 Geo. 4, c. 31, s. 27, that a conviction before justices for a common assault was a bar to a subsequent indictment for feloniously stabbing. That case was recognized in *R. v. Elrington*, 31 L. J., M. C. 14, where it was also held, by the Court of Queen's Bench, that a certificate of dismissal was a bar to an indictment for unlawful wounding, and for causing actual bodily harm arising out of the same cause as the assault. But merely ordering the accused to enter into recognizances is not a conviction within the meaning of 24 & 25 Vict. c. 100, s. 45. *Hartley v. Hindmarsh*, L. R. 1 C. P. 553; 35 L. J., M. C. 255.

It was also held, on the former statute, that the granting of the certificate by the justices on one of the grounds mentioned in the statute was not discretionary or a judicial act, but ministerial only, and that it was valid, although not applied for when the summons was heard. *Hancock v. Somes*, 28 L. J., M. C. 196. And again, that the word "forthwith" did not mean "forthwith upon the hearing of the summons," but "forthwith on the application of the party." *Costar v. Hetherington*, 28 L. J., M. C. 198. The Court of Queen's Bench, in *R. v. Robinson*, 10 L. J., M. C. 9, seem to have acted on an opinion at variance with these decisions, but Lord Campbell, in *Hancock v. Somes*, said that he could not approve of the reasoning in that *310] case. Under sect. 46 the justices have no jurisdiction where a question of title arises, and have no power to consider whether the violence was excessive. *R. v. Pearson*, L. R. 5 Q. B. 237; 39 L. J., M. C. 76; 11 Cox, C. C. 493.

Assault on peace officer. The fact that the defendant did not know that the man whom he assaulted was a peace officer or was in the execution of his duty is no defence. *R. v. Forbes*, 10 Cox, C. C. 362.

In *R. v. Prince*, L. R. 2 C. C. 154, 44 L. J., M. C. 122, *ante*, p. 270, Brett, J., in commenting on the above case of *R. v. Forbes*, said, that although the policeman was in plain clothes, the prisoner certainly had strong ground to suspect, if not to believe, that he was a policeman; but Bramwell, B., cited the case with approval, saying, that the act of assaulting a police officer in the execution of his duty was a wrong in itself.

As to the absence or invalidity of a warrant affording a ground of defence, see tit. "Murder."

Indecent assaults. A man might be convicted upon an indictment charging offences in the nature of rape upon a child under ss. 50, 51 of the 24 & 25 Vict. c. 100 (now contained in 38 & 39 Vict. c. 94, s. 3), notwithstanding the consent of the child, and may also be convicted under s. 4 of the latter Act of a similar offence (see *post*, tit. "Rape"). If the indictment was for an "indecent assault" only, and it appeared that the child consented, the defendant must formerly have been ac-

quitted. *R. v. Read*, 2 C. & K. 957, 61 E. C. L. ; 1 Den. C. C. 377 ; *R. v. Johnson*, L. & C. 632 ; 34 L. J., M. C. 192 ; but by 43 & 44 Vict. c. 45 the consent of a young person under thirteen is no longer a defence to an indecent assault.

Section 52 of the 24 & 25 Vict. c. 100, *ante*, p. 303, also provides for the punishment of indecent assaults on females and attempts carnally to know girls under twelve years of age.

If it appears that the consent of the woman was obtained by fraud, such consent constitutes no defence, see *R. v. Case*, 1 Den. C. C. 580 ; 19 L. J., M. C. 174. *R. v. Bennett*, 4 F. & F. 1105, and see *ante*, p. 306.

In charges of indecent assault, the woman may be cross-examined as to connection with other men ; but she need not answer. If she does answer in the negative her answer is conclusive, and no evidence can be given to contradict her. The same rule prevails in cases of rape, notwithstanding several decisions to the contrary. *R. v. Holmes*, L. R. 1 C. C. R. 334 ; 41 L. J., M. C. 12.

As to what constitutes "Wounding," or "Grievous Bodily Harm," see those titles ; as to "Apprehension," see that title, and also tit. "Murder."

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ATTEMPTS TO COMMIT OFFENCES.

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At common law. At common law every attempt to commit a felony or misdemeanor is in itself a misdemeanor. So long as the act rests in bare intention it is not punishable. But if that intention be unequivocally manifested by some overt act, then it becomes an offence cognizable by the law. And the mere soliciting another to commit a felony is a sufficient overt act to constitute the misdemeanor of attempting to commit a felony. Thus to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the felony was actually committed. *Per* Gross, J., *R. v. Higgins*, 2 East, 8. So an *endeavor* to provoke another to send a challenge to fight has been held to be a misdemeanor. *R. v. Phillips*, 6 East, 464. So, to endeavor by some act to induce another person to attempt to commit a felony is a misdemeanor. *R. v. Ransford*, 13 Cox, C. C. R. 9. And it makes no difference whether the offence which is attempted be one which is an offence at common law, or created by statute. *Per* Parke, B., *R. v. Roderick*, 7 C. & P. 795, 32 E. C. L. So it has been frequently held that attempts to bribe, and attempts to suborn a person to commit perjury, are indictable misdemeanors. 1 Russ. Cr. 5th ed. 190, 318, *post*, tit. "Bribery and Perjury." And by the 14 & 15 Vict. c. 100, s. 9, *infra*, p. 312, a prisoner may be found guilty of this common law offence of the attempt upon an indictment for the principal offence.¹

¹ An assault with intent to kill is no felony at common law, though anciently it was so considered. *Commonwealth v. Barlow*, 4 Mass. 439. In crimes which require force as an element in their commission, there is no material difference between an assault with intent and an assault with attempt, to commit the crime. *Johnson v. State*, 14 Ga. 55; *Prince v. State*, 35 Ala. 367. [But while an indictment for an attempt to commit rape may be sustained by proof of threats, one for an assault with intent to commit a rape cannot be, as the latter implies force. *Burney v. State*, 21 Tex. App. 565.] In an indictment for an assault with an intent to commit a murder, the intent must be specifically proved. *State v. Neal*, 37 Me. 468; *King v. State*, 21 Ga. 220; *State v. McClun*, 25 Mo. 338; *Hopkinson v. People*, 18 Ill. 264. As for attempts to commit offences: See *Commonwealth v. Dennis*, 105 Mass. 162; *State v. Ellis*, 33 N. J. 102; *State v. Sales*, 2 Nev. 263; *Smith v. Commonwealth*, 54 Pa. St. 209. The principle that to make a crime of an attempt to commit a crime, there must have been a present ability to perpetrate the crime intended, applies only to the act itself. If the act is in itself efficient to produce the effect intended, the offence is complete, although the effect be defeated by something extrinsic to the act. *State v. Wilson*, 30 Conn. 500. In order to constitute an attempt to commit a crime, there must appear to have been more than a mere design or intention to commit the offence;

By statute. Many attempts to commit offences are provided for by statute. Most of them would be offences at common law, but, by statute, severe penalties are attached to them, or they are even made independent felonies. Thus, by the 24 & 25 Vict. c. 100, ss. 18, 21 (*supra*, p. 301), the attempt to commit any of the offences therein mentioned is made a felony. By s. 15 of the same statute, "Whosoever shall, by any means other than those specified in any of the preceding sections of this act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

In s. 21 (*supra*, p. 301), the attempt to choke, etc., is specially *mentioned. By s. 62 (*supra*, p. 303), any attempt to commit [*312 an infamous crime is specially provided for.

In almost all cases provisions for the offence of setting fire to various kinds of property are followed by provisions directed against the attempt to commit the same offence. See 24 & 25 Vict. c. 97, ss. 8, 10, 18, 27, 38, 44, *supra*, tit. "Arson."

Conviction for attempt on indictment for principal offence. By the 14 & 15 Vict. c. 100, s. 9, "if upon the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." It has been suggested that the above section only applies to offences created by statute passed subsequently to that Act, and that it does not apply to felonies at common law. If that is so the prisoner ought to be separately indicted for the attempt to commit the common law felony. But the words of the statute seem to be very general, and would probably be held to include felonies at common law. See note to *R. v. Bain*, L. & C. 129; *R. v. Hapgood*, L. R. 1 C. C. 221; 39 L. J., M. C. 83, *post*, p. 314.

Nature of the attempt. It is not easy always to decide whether or not an indictable attempt has been committed. The following cases may there must have been some ineffectual act or acts towards its accomplishment. *People v. Lawton*, 56 Barb. 126. 8.

In an indictment for an assault with attempt to steal, the goods need not be described when nothing has been taken. *Grogan v. State*, 63 Miss. 147.

serve to illustrate the subject. In *R. v. Carr*, Russ. & Ry. 377, the prisoner was indicted under the repealed statute, 7 Will. 4 & 1 Vict. c. 85, s. 3, for attempting to discharge a loaded gun at a person with intent to murder; the jury found that the gun was loaded, but not primed; it was held that the prisoner could not be convicted. So where the touch-hole was plugged, so that the arm could not be discharged. *R. v. Harris*, 5 C. & P. 153, 24 E. C. L. In *R. v. Williams*, 1 Den. C. C. 39, the prisoner was indicted under the last-mentioned section for attempting to administer poison. It appeared that he had delivered poison to V. and desired him to put it into B.'s beer; V. delivered the poison to B. and told him what had passed. It was held that the prisoner could not be convicted on this indictment. But *quære* if this is not an attempt indictable at common law; see the case of *R. v. Higgins*, *supra*. In *R. v. St. George*, 9 C. & P. 483, 38 E. C. L., the prisoner was indicted under the 7 Will. 4 & 1 Vict. c. 85, s. 4, for an attempt to shoot; he had put his finger on the trigger of a loaded fire-arm with the intention of shooting, but was prevented from doing so; this was held by Parke, B., not to be an attempt to shoot within the statute. This opinion was delivered after a careful consideration and consultation with Williams, J. Considerable doubt has, however, been thrown upon this decision in *R. v. Brown*, 10 Q. B. D. 381; 52 L. J., M. C. 49. In *R. v. Taylor*, 1 F. & F. 535, the prisoner was indicted for attempting to set fire to a stack. It *313] appeared that the prisoner, after a quarrel with the prosecutor, and a threat "to burn him up," went to a neighboring stack, and kneeling down close to it, struck a lucifer match, but, discovering that he was watched, blew out the match and went away. Pollock, C. B., told the jury that, if they thought the prisoner intended to set fire to the stack, and that he would have done so if he had not been interrupted, this was, in his opinion, a sufficient attempt to set fire to the stack within the meaning of the statute. "It is clear," said the learned judge, "that every act committed by a person with the view of committing the felonies therein mentioned is not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." In *R. v. McPherson*, Dears. & B. C. C. 197, the prisoner was indicted for breaking and entering a dwelling-house and stealing therein certain goods specified in the indictment. It appeared that at the time the house was being broken into, the goods specified were not in the house, but there were other goods there belonging to the prosecutor. The jury found the prisoner guilty of breaking and entering the dwelling-house and attempting to steal the goods therein. But the Court of Criminal Appeal held that the conviction could not be

supported. Cockburn, C. J., said, "I think attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that, which, if successful, would amount to the felony charged. Here the attempt never could have succeeded, as the goods which the indictment charges the prisoner with stealing had been removed." See *R. v. Collins*, L. & C. 471; 33 L. J., M. C. 177: and also *R. v. Johnson*, 34 L. J., M. C. 24.

The prisoner had procured from an innocent agent certain implements and dies for the purpose, and with the intention of making counterfeit Peruvian dollars, but the prisoner only intended to make a few dollars in England by way of experiment, and then send the apparatus out to Peru. The prisoner was indicted for procuring coining instruments with intent to use them for the purpose of making counterfeit foreign coin, and so attempting to make such counterfeit coin. Another count charged him with attempting to coin counterfeit Peruvian half-dollars by procuring coining instruments, with intent to use them in coining such counterfeit coin; a third count was for attempting to coin Peruvian half-dollars, without stating the means. The question was reserved for the Court of Criminal Appeal, whether the prisoner by procuring the instruments mentioned in the indictment, with the intention of using them in the manner above stated, was guilty of an offence against the law of this country, and whether any or either of the above counts sufficiently alleged such offence. The conviction was upheld. The only question argued was, whether the attempt was sufficiently connected with the offence to constitute an attempt to commit a felony, and the court held that it was, as there was a clear criminal intent, *indicated by an overt act which was unequivocal. *R. v. [314 Roberts*, 1 Dears. C. C. 539.

The prisoner was servant to a contractor for the supply of meat to the camp at Shorncliffe: it was the course of business for the contractor to send the meat to the quartermaster-sergeant, who with the assistance of the prisoner or some other servant of the contractor weighed the meat with his own weights and scales, and served it out to the different messes, a soldier attending from each mess for the purpose of receiving it: the prisoner removed one of the weights supplied by the quartermaster-sergeant, and substituted for it a short weight of his own. By this means the quantity delivered to the soldiers was about 45 lbs. less, and the quantity remaining over, which would in the course of business have been carried away to the contractor, was about 45 lbs. more than it ought to have been. The fraud was detected before the weighing was completed, and the prisoner absconded. The jury found that he intended to dispose of the 45 lbs. surplus for his own purposes. Upon these facts he was convicted of attempting to steal 45 lbs. of meat, the property of his master. The Court for Crown Cases Reserved upheld the conviction. Erle, C. J., observed, "It is said that the evidence does not show any such proximate overt act as is sufficient to support the conviction for an attempt to steal the meat. In my opinion there were several overt acts which

brought the attempt close to completion. These were the preparation of the false weight, the placing it in the scale, and the keeping back the surplus meat. It is almost the same as if the prisoner had been sent with two articles, and had delivered one of them as if it had been two. To complete the crime of larceny there only needed one thing, the beginning to move away with the property." Blackburn, J., observed, "There is no doubt a difference between the preparation antecedent to an offence and the actual attempt, but if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime." *R. v. Cheeseman*, 1 L. & C. 140. To write and send a letter to another person with intent to incite that person, was held to be an attempt to incite, though the person to whom the letter was sent did not read it. *R. v. Ransford*, 13 Cox, C. C. R. 9.

Aiding in an attempt. Where one prisoner was charged with committing a rape and another with assisting in the rape, and the jury found the principal offender guilty of an attempt to commit a rape and the accessory of aiding in the attempt, it was held that the conviction was right. *R. v. Wyatt*, 39 L. J., M. C. 83; *R. v. Hapgood*, L. R. 1 C. C. R. 221.

*BANKRUPT, OFFENCES BY.

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Offences against the bankrupt laws. The "Debtors Act, 1869" (32 & 33 Vict. c. 62), which came into operation the same day as the "Bankruptcy Act, 1869" (32 & 33 Vict. c. 71), viz., January 1st, 1870, contains provisions with respect to the offences of fraudulent debtors which are very similar to those which were formerly contained in the Bankruptcy Acts. Words and expressions contained in the Debtors Act are to have the same meaning as the same words and expressions have in the Bankruptcy Act as they are there defined or explained. The Bankruptcy Act, 1869, was repealed by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which came into operation the 31st Dec., 1883, and which by s. 149 (2) enacts that where by any Act or instrument, reference is made to the Bankruptcy Act, 1869, the Act or instrument is to be construed and have effect as if reference was made therein to the corresponding provisions of this Act. By s. 163 (2) the provisions of the Debtors Act, 1869, as to offences by bankrupts are to apply to any person whether a trader or not, in respect of whose estate a receiving order has been made, as if the term "bankrupt" in that Act included a person in respect of whose estate a receiving order had been made. As to the making, etc., of a receiving order, see s. 5, *et seq.*

By s. 11 of the Debtors Act, any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labor; that is to say,

Sub-s. 1. If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense

*316] *of his family, unless the jury is satisfied that he had no intent to defraud. A disclosure under this sub-section is not restricted to property in possession of the bankrupt at the commencement of his bankruptcy. *R. v. Mitchell*, 50 L. J., M. C. 76 ; 10 Cox, C. C. R. 490, where the evidence on which the bankrupt was held to have been rightly convicted related to transactions respecting property disposed of some twelve months previously :

Sub-s. 2. If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud :

Sub-s. 3. If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud :

Sub-s. 4. If after the presentation of a bankruptcy petition by or [46 & 47 Vict. c. 52, s. 163 (1)] against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud :

Sub-s. 5. If after the presentation of a bankruptcy petition by or (46 & 47 Vict. c. 52, s. 163) against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of 10*l.* or upwards. Where the prisoner executed an assignment of the property on his farm to trustees for the benefit of his creditors which was not registered as a bill of sale, and afterwards fraudulently removed stock from the farm to the extent of 10*l.* and then liquidated his affairs by arrangement, it was held that he could not properly be convicted under s. 11, sub-s. 5. The assignment, not having been registered as a bill of sale, was void as against the trustee in liquidation ; but was otherwise in force ; and the property in the stock removed was not the prisoner's, within the section, but was at the time of the fraudulent removal the trustee's under the assignment. *R. v. Creese*, L. R. 2 C. C. 105 ; 43 L. J., M. C. 51.

Sub-s. 6. If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud :

Sub-s. 7. If knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof :

Sub-s. 8. If after the presentation of a bankruptcy petition by or (46 & 47 Vict. c. 52, s. 163) against him or the commencement of the liquidation he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :

Sub-s. 9. If after the presentation of a bankruptcy petition by or

(46 & 47 Vict. c. 52, s. 163) against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, *unless the jury is satisfied that he had no intent to conceal [*317 the state of his affairs or to defeat the law :

Sub-s. 10. If after the presentation of a bankruptcy petition by or (46 & 47 Vict. c. 52, s. 163) against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :

Sub-s. 11. If after the presentation of a bankruptcy petition by or (46 & 47 Vict. c. 52, s. 163) against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs :

Sub-s. 12. If after the presentation of a bankruptcy petition by or (46 & 47 Vict. c. 52, s. 163) against him or the commencement of the liquidation, or at any meeting of his creditors within four months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses :

Sub-s. 13. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same :

Sub-s. 14. If within four months next before the presentation of a bankruptcy petition by him or (46 & 47 Vict. c. 52, s. 163) against him or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud :

Sub-s. 15. If within four months next before the presentation of a bankruptcy petition by him or (46 & 47 Vict. c. 52, s. 163) against him or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud :

Sub-s. 16. If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his bankruptcy or liquidation.

It is sufficient in arrest of judgment upon an indictment for an offence under sub-section 13 to allege that the bankrupt "by certain

false representations did obtain property on credit and has not paid for the same." *R. v. Watkinson*, 12 Cox, C. C. 271, C. C. R.

12. If any person who is adjudged a bankrupt or has his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of 20*l.* or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he *318] *had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labor.

Since the passing of the 37 & 38. Vict. c. 62, an infant cannot be convicted of appropriating any part of his property "which ought by law to be divided amongst his creditors" where the debts proved against his estate are only trade debts and it does not appear there are any debts for necessities supplied to him. *R. v. Wilson*, 5 Q. B. D. 28; 49 L. J., M. C. 13.

13. Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labor; that is to say,

Sub-s. 1. If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud:

Sub-s. 2. If he has, with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of, or any charge on his property:

Sub-s. 3. If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

An indictment under sub-section 1 for obtaining credit "by means of fraud other than by false pretences," was held bad for not setting out the means. *R. v. Bell*, 12 Cox, C. C. 37; but see *R. v. Watkinson*, *supra*.

Sect. 13 applies to "any person" whether bankrupt or not. Where a judgment had been recovered against a person not a bankrupt, and on the very next night he removed his property from his house in order to defeat the creditor who had obtained the judgment, it was held that he could be brought within sub-s. 3; but inasmuch as the indictment charged an intent to defraud his "creditors," and there was no proof, beyond the intention to defraud the particular judgment creditor which was not left to the jury as evidence of an intent to defraud creditors generally, and no evidence to show there were other creditors, it was held that the conviction could not be sustained. *R. v. Rowlands*, 8 Q. B. D. 530; 51 L. J., M. C. 51.

Sect. 14 relates to false declarations by creditors, see *post*, "False Declarations."

15. Where a debtor makes any arrangement or composition with his creditors under the provisions of The Bankruptcy Act, 1869 (see now 46 & 47 Vict. c. 52, s. 149, *ante*, p. 315), he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends.

16. Where a trustee in any bankruptcy [including the official receiver of a bankrupt's estate (46 & 47 Vict. c. 52, s. 164)] reports to any court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the court shall, if it appears to the court that there is a *reasonable probability that the bankrupt may be convicted, [*319] order the trustee to prosecute the bankrupt for such offence.

17. Where the prosecution of the bankrupt under this Act is ordered by any court, then, on the production of the order of the court, the expenses of the prosecution shall be allowed, paid, and borne, as expenses of prosecutions for felony are allowed, paid, and borne.

18. Every misdemeanor under the second part of this Act shall be deemed to be an offence within and subject to the provisions of the 22 & 23 Vict. c. 17, intituled "An Act to prevent vexatious indictments for certain misdemeanors;" and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent.

This means that the offence shall be within the above-named statute as controlled by the 30 & 31 Vict. c. 35. See *R. v. Bell*, 12 Cox, C. C. 37.

19. In an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged, in the words of this Act, specifying the offence or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under The Bankruptcy Act, 1869; see now 46 & 47 Vict. c. 52; s. 149, *ante*, p. 315; see *post*, p. 321. But where the offence charged is within a section in which the adjudication of bankruptcy is a necessary ingredient, *e. g.*, s. 11, sub-s. 15, an averment of that fact must be stated in the indictment. *R. v. Oliver*, 13 Cox, C. C. R. 588.

20. So much of the Act of the session of the fifth and sixth years of her Majesty's reign (chapter thirty-eight), "to define the jurisdiction of justices in general and quarter sessions of the peace," as excludes from the jurisdiction of justices and recorders at sessions of the peace or adjournments thereof the trial of persons for offences

against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this Act; and any offence under this Act shall be deemed to be within the jurisdiction of such justices and recorders.

By sect. 23, where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act of Parliament or at common law or under this Act, so that he be not punished twice for the same offence. By 46 & 47 Vict. c. 52, s. 31, where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanor, and may be dealt with and punished as if he had been guilty of a misdemeanor under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section.

By sect. 167. Where a debtor has been guilty of any criminal offence he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme has been accepted or approved.

Proof of valid bankruptcy. It is necessary to prove on an *320] indictment for this offence all the ingredients of a valid bankruptcy, such as the petitioning creditor's debt, the act of bankruptcy and the trading, but see now *infra*. *R. v. Lines*, 4 B. & Ad. 345, 24 E. C. L.; *R. v. Lands*, 25 L. J., M. C. 14.

By the repealed statute 12 & 13 Vict. c. 106, s. 233, if the bankrupt did not appear within a certain time, notice in the London Gazette was made conclusive evidence of the bankruptcy as against him. This provision was held to apply to criminal proceedings against the bankrupt, *per Coleridge, J.*, in *R. v. Hall*, Newcastle Spring Assizes, 1846, M. S.; but not against other parties; *R. v. Harris*, 4 Cox, C. C. 140; in which case Platt, B., also held that it was a condition precedent in the admissibility of the Gazette that the prosecutor should give some evidence that the bankrupt had not taken any steps to annul the fiat.

When it appeared upon the petition that it was assigned by ballot to Mr. Commissioner Goulburn, but the subsequent proceedings were either before Mr. Commissioner Holroyd or Mr. Commissioner Fonblanque, it was held that this did not render the proceedings invalid. *R. v. Gordon*, 25 L. J., M. C. 19.

If any of the documents put in contain erasures and interlineations they will not thereby be rendered inadmissible in evidence, although no proof be given when they were made; the presumption in such cases being against fraud and misconduct. *Id.*

It was held that an indictment on the repealed statute 12 & 13 Vict. c. 106, s. 267, may allege generally that the defendant had been duly adjudged bankrupt, but if it alleges special grounds of adjudication of bankruptcy, which do not amount to an act of bankruptcy, it is bad

upon the face of it, and a conviction upon it cannot be supported. *R. v. Masson*, L. & C. 212.

Where a person has been adjudicated a bankrupt, and has not taken steps to dispute or set aside the adjudication within the time appointed by the repealed statute 12 & 13 Vict. c. 106, s. 233, the Gazette is conclusive evidence of the bankruptcy as against him upon a prosecution for a misdemeanor under the Bankruptcy Act; and even if the proceedings are put in evidence, he cannot take advantage of any irregularity that may appear upon the face of them. *R. v. Levi*, L. & C. 597.

A debtor was indicted under section 11 for failing for one month to inform the trustee of false debts. The evidence was that on the 23rd of September, 1870, he filed a petition for liquidation by arrangement or composition. On the 10th of October three false debts were proved with his connivance. At that meeting, a "composition" of 8s. in the pound, payable by instalments, was accepted, and a trustee appointed. On the 12th of October the registrar certified the appointment of the trustee under "liquidation by arrangement." On the 19th of October it was resolved that the debtor's affairs should be "liquidated by arrangement;" and it was held that there was sufficient proof of the appointment of a trustee under liquidation by arrangement upon the 10th of October. *R. v. Beaumont*, 12 Cox, C. C. 183.

The following provision of the Bankruptcy Act, 1883, appears to render any other proof of a valid bankruptcy than the production of the Gazette quite unnecessary.

132. (1.) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

* (2.) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudg- [*321
ing a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.

133. (1.) A minute of proceedings at a meeting of creditors under this Act signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute was signed, shall be received in evidence without further proof.

(2.) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had.

Section 134. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

136. In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.

137. Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal, and of the signature of the judge or registrar of any such court, in all legal proceedings.

138. A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment.

140. (1) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary to the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade shall be conclusive evidence of the fact so certified.

Where the copy of the Gazette was not produced, Lush, J., admitted an order of adjudication under the seal of the Court to prove the fact of the debtor being "adjudged bankrupt" within the meaning of the eleventh section, and said the provision as to the Gazette is only cumulative, and the bankruptcy may be proved by the Gazette or otherwise. *R. v. Thomas*, 11 Cox, C. C. 535. A page of the London Gazette cut from that part which contained the advertisement of the *322] notice of the bankruptcy petition was held to have been wrongly received in evidence. *R. v. Lowe*, 15 Cox, C. C. R. 286.

Obtaining goods on credit. An obtaining goods on approval is not an obtaining of credit, within section 221 of the former Bankruptcy Act. *R. v. Lyons*, 9 Cox, C. C. 229. Sub-section 15 of sect. 11 (*ante*, p. 317) speaks of disposing "otherwise than in the ordinary way of his trade," and upon these words it was ruled by Lush, J., after consulting Martin, B., that the disposing by a bill of sale of a portion of a trader's goods not paid for was clearly within this section. *R. v. Thomas*, 11 Cox, C. C. 535.

Concealment, etc., of property. With respect to concealment of his property by the bankrupt, in order to bring the prisoner within the statute, it must appear that there was a criminal intent in his refusing to disclose his property. Thus where the prisoner was indicted under the 5 Geo. 2, c. 30, for not submitting to be examined, and truly

disclosing, etc., and the evidence was, that on the last day of examination he appeared before the commissioners and was sworn and examined, but as to certain parts of his property he refused to give any answer, stating that this was not done to defraud his creditors, but under legal advice to dispute the validity of his commission, and the prisoner was convicted, the judges, on a case reserved, held the conviction wrong. *R. v. Page*, Russ. & Ry. 392; 1 Brod. & B. 308, 5 E. C. L.

In *R. v. Harris*, 1 Den. C. C. R. 461; 19 L. J., M. C. 11, the indictment charged that the bankrupt surrendered himself, etc., and was then and there duly sworn, etc., and duly submitted himself to be examined, etc., and that at the time of his said examination, etc., he was possessed of a certain real estate, to wit, etc., and that at the time of his said examination, and being so sworn as aforesaid, he then and there feloniously did not discover when he disposed of, assigned and transferred the said real estate, etc. It was held that the indictment was bad for repugnancy, as it charged the prisoner with not discovering at the time of his examination when he disposed of an estate, which was averred to be in his possession at the time of his examination.

If on his examination the bankrupt refer to a document, as containing a full and true discovery of his estate and effects, it is incumbent on the prosecutor to produce that book, or to account for its non-production; for otherwise it cannot be known whether the effects have been concealed or not. *R. v. Evani*, 1 Moody, C. C. 70. It is not necessary that the concealment should have been effected by the hands of the prisoner himself, or that he should be shown to have been in the actual possession of the goods concealed, after the issuing of the commission; it is sufficient if another person, having the possession of the effects as the agent of the prisoner, and holding them subject to his control, is the instrument of the concealment. See *Id.* A secreting by a bankrupt of his goods is sufficient to constitute a concealment, although a full disclosure is afterwards made to the commissioners before the bankrupt's last examination. *Courtivron v. Meunier*, 6 Ex. 74; 20 L. J., Ex. 104, overruling *R. v. Walters*, 5 C. & P. 133, 24 E. C. L. But the concealment must be wilful. *Id.*

The evidence of the concealment, and of the guilty intent with which the act is done, consists in the conduct of the prisoner with reference to the goods concealed from the time when he became, or *was likely to become, bankrupt. Concealment of goods in [*323 the houses of neighbors or of associates, or in secret places in the bankrupt's own house, or sending them away in the night, endeavoring to escape abroad with part of his effects, etc., constitute the usual proofs in cases of this description.

Proof of the value of the effects. Where the prosecution is on the ground of concealing effects, it must be proved that those effects were of the value of 10*l.* And where the value is attached to all the articles collectively, as "one table, six chairs, and one carpet, of the

value of 10*l.* and upwards," it is necessary to make out the offence as to every one of the articles, for, if any are rejected, there is no sufficient averment of the value in the indictment. *R. v. Forsyth*, Russ. & Ry. 274; 2 Russ. Cri. 450, 5th ed. But this might now be amended.

In *R. v. Davison*, 7 Cox, C. C. 158, Alderson, B., doubted whether embezzling small sums on different days, not in any instance amounting to 10*l.*, could be considered within the Act.

Proof of intent to defraud. Lastly, the prosecutor must prove the intent of the bankrupt to defraud his creditors. This will, in general, appear from the whole circumstances of the case. Evidence of it may likewise be gathered from the declarations of the prisoner.

Lord Denman, after consulting Patteson, J., held that an indictment, under the repealed 6 Geo. 4, c. 16, s. 112, against a bankrupt for not surrendering, was bad, for not alleging that it was with intent to defraud his creditors; the words "with intent to defraud his creditors" applying to all the offences comprised in the section. *R. v. Hill*, 1 C. & K. 168, 47 E. C. L. The absconding of the bankrupt, with the view of avoiding the examination, is good evidence of the intent, although by reason of such absconding the bankrupt may have had no knowledge of the proceedings in bankruptcy. In *R. v. Gordon*, 25 L. J., M. C. 19; Dears. C. C. 586, an indictment for not surrendering, the jury found that there was no evidence that the prisoner had actual knowledge of the adjudication of the summons to surrender, but that the prisoner and his partner had left this country before the adjudication, believing that they should be made bankrupts, and that they stayed abroad with the intent to defraud their creditors, by depriving them of their rights to examine the bankrupts and to make them responsible. The court held that this finding was sufficient to support a conviction. In *R. v. Ingham*, 29 L. J., M. C. 18, an indictment for making false entries under s. 252, of the repealed statute, 12 & 13 Vict. c. 106, the jury found that the false entries were made by the bankrupt with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in due course of bankruptcy, and to save him from having to account for a deficiency which appeared in the genuine account; but they also found that it was not done to defraud the creditors of any money or property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation by him. The Court of Criminal Appeal quashed the conviction, on the ground that, though there might be an intention to deceive, the jury had expressly negatived an intention to defraud. See also *R. v. Hughes*, 1 F. & F. 726, acc. The Debtors Act, 1869, says that the debtor shall be guilty of a misdemeanor in certain cases, "unless *324] the jury are satisfied that he has no intent to defraud" (see sect. 11, except under sect. 13); it seems, therefore, that it is now for the prisoner to rebut the presumption of fraud. See *R. v. Thomas*, 11 Cox, C. C. 535; *R. v. Bolus*, 11 Cox, C. C. 610; *R. v. Cherry*, 12 Cox, C. C. 32.

Examination of bankrupt. As to compulsory evidence under bankruptcy proceedings, see *ante*, pp. 52, 161, 282.

Venue. An indictment for not surrendering cannot be sustained in a different county from that in which the bankrupt was a trader, or in which he committed an act of bankruptcy. *Per* Maule, J., in *R. v. Milner*, 2 C. & K. 310, 61 E. C. L.

See, as to "False Declarations" relating to matters in bankruptcy, that title, *infra*.

Arrest of bankrupt. By 46 & 47 Vict. c. 52, s. 25, the Court may by warrant arrest a debtor under certain circumstances.

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*BARRATRY.

A BARRATOR is defined to be a common mover, exciter, or maintainer of suits or quarrels either in courts or in the country, and it is said not to be material, whether the courts be of record or not, or whether such quarrels relate to a disputed title or possession, or not; but that all kinds of disturbances of the peace, and the spreading of false rumors and calumnies, whereby discord and disquiet may grow amongst neighbors, are as proper instances of barratry as the taking or keeping possession of lands in controversy. But a man is not a barrator in respect of any number of false actions brought by him in his own right, unless, as it seems, such actions should be entirely groundless and vexatious, without any manner of color. Nor is an attorney a barrator in respect of his maintaining his client in a groundless action, to the commencement of which he was in no way privy. Hawk. P. C. b. 1, c. 81, ss. 1, 2, 3, 4; 1 Russ. Cri. 362, 5th ed.

Barratry is a cumulative offence, and the party must be charged as a *common barrator*. It is, therefore, insufficient to prove the commission of one act only. Hawk. P. C. b. 1, c. 81, s. 5. For this reason the prosecutor is bound, before the trial, to give the defendant a note of the particular acts of barratry intended to be insisted on, without which the trial will not be permitted to proceed. *Id.* s. 13. The prosecution will be confined by these particulars.¹ *Goddard v. Smith*, 6 Mod. 262. See Car. Supp. 321; *supra*, p. 194.

The punishment of this offence is fine and imprisonment, and being held to good behavior, and in persons of any profession relating to the law, the further punishment is added of being disabled to practise for the future. Hawk. P. C. b. 1, c. 81, s. 14; 34 Edw. 3, c. 1.

By the 12 Geo. 1, c. 29, s. 4, if any person convicted of common barratry shall practise as an attorney, solicitor, or agent, in any suit or action in England, the judge or judges of the court where such suit or action shall be brought, shall, upon complaint or information, examine the matter in a summary way in open court, and if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years. This Act was revived and made perpetual by 21 Geo. 2, c. 3, which is repealed, but the above enactment is now made perpetual by the repeal of the section which provided for its expiration, viz., the last section of the Act. See the Stat. Law Rev. Act, 1867.

As to maintenance, see *post*, tit. "Maintenance."

¹ *State v. Chitty*, 1 Bailey, 379; *Commonwealth v. Cooper*, 15 Mass. 187; *Commonwealth v. Davis*, 11 Pick. 434; 1 Russell, C. & M. 185, et seq., b. 2, c. 23, 3d Am. ed. S.

*BIGAMY.

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By statute. The offence of bigamy was originally only of ecclesiastical cognizance, but was made a felony by the 1 Jac. 1, c. 11. By the second section of that statute, it was provided that the Act should not extend to any person or persons whose husband or wife should be continually remaining beyond the seas by the space of seven years together, or whose husband or wife should absent him or herself, the one from the other, by the space of seven years together, in any parts within his majesty's dominions; the one of them not knowing the other to be living within that time. By section 3, it was provided that the Act should not extend to any person or persons that are, or shall be, at the time of such marriage, divorced by any sentence in the ecclesiastical court, or to any person or persons where the former marriage shall be by sentence in the ecclesiastical court *declared to be void and of no effect, nor to any person or persons in or by reason of any former marriage had or made within age of consent. [*327

By the repealed statute 35 Geo. 3, c. 67, persons guilty of bigamy were made liable to the same punishment as persons convicted of fraud or petit larceny.

By the 9 Geo. 4, c. 31 (E.), both of the above statutes were repealed, and other provisions substituted in their place.

This statute is also now repealed, and by the 24 & 25 Vict. c. 100, s. 57, "whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England, or Ireland, or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three [now five] years; or to be imprisoned for any term not exceeding two years, with or without hard labor; and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended, or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty; or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time; or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."¹

Proof. Upon an indictment for bigamy, the prosecutor must prove: 1. The two marriages; 2. The identity of the parties; 3. That the first wife is alive; and if she has been absent for seven years, then, 4. That the prisoner knew she was alive.

I. THE TWO MARRIAGES.

Proof of valid marriage—second marriage. Very considerable difficulties occur, in some cases, in ascertaining how far either or both marriages must be shown to be valid. So far as relates to the first marriage, the question, what marriages will be considered void for the purpose of bigamy, will be found discussed, *infra*, p. 328, *et seq.* With

¹ In England adultery is cognizable in the Ecclesiastical Courts. In some of the States it has been held an offence cognizable at common law. *State v. Wallace*, 9 N. H. 515; *State v. Avery*, 7 Conn. 266; *State v. Cox*, N. C. Term R. 165. But in most of the States the subject has been generally covered by legislation. As in bigamy, the allegation of marriage is essential and must be proved. *Buchanan v. State*, 55 Ala. 154; *Commonwealth v. Holt*, 121 Mass. 61. But the indictment need not mention the wife's name. *Davis v. Commonwealth*, 1 Pa. Sup. Ct. Dig. 228. Adultery is proved where only one of the parties is married. *White v. State*, 74 Ala. 31. On whether the adultery may be inferentially proved. *Alsabrooks v. State*, 52 Ala. 24; *State v. Way*, 5 Neb. 283; *State v. Bridgman*, 49 Vt. 202. Evidence of a conversation between the defendants to show that their object in coming together was other than an adulterous one, is inadmissible. *Commonwealth v. Bowers*, 121 Mass. 45. In an indictment for adultery, the husband of the woman is not a competent witness when both are on trial together. *Birge v. State*, 78 Ala. 435.

regard to the necessity of proving the validity of the second marriage, but for the existence of the first marriage, considerable doubt used to exist, for it was thought that it was necessary to prove such a legal marriage as would but for the prior marriage have been a binding marriage for all purposes. But it was held, that where a woman already married, and having a husband alive, marries with the widower of her deceased sister, she was guilty of bigamy, though by the 5 & 6 Will. 4, c. 54, such a marriage is declared to be null and void to all intents and purposes whatsoever. *R. v. Brawn*, 1 C. & K. 144, 47 E. C. L. And in *R. v. Allen*, L. R., 1 C. C. R. 367; 41 L. J., M. C. 97, confirming the above decision, and disapproving of *R. v. Fanning*, 10 *Cox, C. C. R. (*Irish*) 411, *post*, p. 334, it was held that where a person already bound by an existing marriage [*328 goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, that will be a bigamous marriage, although invalid by reason of some legal disability in the parties.¹ If, however, the form of marriage gone through is not shown to be one recognized by the law, it is not a bigamous marriage. *Burt v. Burt*, 29 L. J., P. M. & A. 133, approved in *R. v. Allen*, *supra*.

Where in a marriage before a registrar the prisoner, who had been previously married, gave a false name without the knowledge of the woman, it was held that this would not invalidate the marriage so as to acquit the prisoner of the charge of bigamy. *R. v. Rea*, L. R., 1 C. C. R. 365; 41 L. J., M. C. 92.

Proof of a valid marriage—first marriage—not presumed. The law will not in cases of bigamy presume a valid marriage to the same extent as in civil cases. *Per Bailey, J., Smith v. Huson*, 1 Phill. 287.²

It is not sufficient to prove cohabitation and marriage by reputation. *Catherwood v. Caslon*, 13 M. & W. 261.³ "A certified copy of the certificate of the marriage with B. and evidence of cohabitation with a

¹ Proof of first marriage by cohabitation. *Langtry v. State*, 30 Ala. 536. In bigamy, confessions of defendant are not enough to prove the first marriage, though supported by evidence of cohabitation and reputation; proof of actual marriage, either by the record or an eye-witness, is requisite. *Gahagan v. People*, 1 Park. C. R. 378; *Bird v. State*, 21 Gratt. 800. An indictment for bigamy should allege the first marriage to be a lawful marriage, and that at the time of the second marriage the accused knew his lawful wife to be alive. *King v. State*, 40 Ga. 244. To support an indictment for bigamy, it is a sufficient marriage in fact that the parties agree to be husband and wife, and cohabit and recognize each other as such. It is immaterial whether a person who pretended to solemnize the contract was or was not a clergyman or magistrate, or that either party was deceived by his false representation of that character. *Hayes v. People*, 25 N. Y. 390. S.

Marriage to a second woman in another State, followed by cohabitation, in Illinois will support an indictment. *Tucker v. People*, 117 Ill. 88. On an indictment for bigamy it is not necessary to prove cohabitation; the crime is complete though there be an immediate separation without cohabitation. *Gise v. Commonwealth*, 81 Pa. St. 428.

² *People v. Wentworth*, 4 N. Y. Crim. Rep. 207.

³ But where the proof of marriage is contradicted, cohabitation is competent evidence in corroboration. *People v. Wentworth*, 4 N. Y. Crim. Rep. 207.

person of that name immediately afterwards was held insufficient by Hawkins, J. (Recorder of London, *diss.*), *R. v. Simpson*, 15 Cox, C. C. 323."

Proof of valid marriage—prisoner's admission. In *R. v. Newton*, 2 Moo. & Rob. 503, Wightman, J., held that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place. And the same learned judge held the same in *R. v. Simmonds*, 1 C. & K. 164, 47 E. C. L.; but in *R. v. Flaherty*, 2 C. & K. 782, 61 E. C. L., where a man went to a police station, and stated that he had committed bigamy, and when and where the first marriage took place, and while in custody signed a statement to the same effect, Pollock, C. B., thought this, though some evidence of the first marriage, was not sufficient. Probably this opinion was founded on some suspicion, in the particular case, of the truth of the admission.¹

Proof of a valid marriage—second wife a competent witness. After proof of the first marriage, the second wife is a competent witness, for then it appears that the second marriage is void.² *Bull. N. P.* 287; 1 East, P. C. 469.

Proof of a valid first marriage—proof that valid ceremony was performed—marriages in England. It is clear that unless the first marriage be valid, the crime of bigamy cannot be committed. Where the marriage has taken place in England, it may have been celebrated either in a church or chapel where marriages have been usually solemnized, or which is duly licensed by a bishop, according to the rites of the Church of England, or in a duly registered chapel according to such form as the parties please, before some registrar of

¹ The confessions of one indicted for bigamy, of a prior marriage in another State than the one in which the indictment is laid, is properly received in evidence against him. The jury have only to be satisfied that the admission of a prior marriage involved an admission of its validity. *Williams v. State*, 54 Ala. 131. But though the admissions of defendant, as to a prior marriage, are evidence against him, they cannot be introduced in his favor unless as part of matters called out by the State. *State v. Hughes*, 35 Kan. 626. The force of the evidence of a prior marriage, derived from the defendant's admissions thereof, depends upon the circumstances under which such admissions were made. *Commonwealth v. Henning*, 10 Phil. (Pa.) 209; *Arnold v. State*, 53 Ga. 574; *Brown v. State*, 52 Ala. 338; *Commonwealth v. Jackson*, 11 Bush, (Ky.) 679. The second marriage must be proved. The admission of the defendant is not sufficient. *Tucker v. People*, 117 Ill. 88.

² In a trial for bigamy, the true wife cannot be admitted as a witness to prove her own marriage, or her husband's confession that he had subsequently married another woman. *Williams v. State*, 44 Ala. 24. A wife cannot testify against her husband on a charge of bigamy, even with his consent. *Wilson v. Hill*, 2 Beasley, (N. J.) 143; *State v. McDavid*, 15 La. An. 403. S.

The offer of one indicted for polygamy to show that a polygamous marriage was a part of his religion, refused on the ground that such evidence has no foundation for its admission in either justice, reason, or law. *United States v. Reynolds*, 1 Utah Ty. 226.

the district and two witnesses, or before a superintendent registrar and some registrar of the district.

With regard to the first, it is sufficient to call a person who was present at the ceremony, and it will be presumed to have been in all respects duly performed; or, without calling any person who was present at the marriage, it will be sufficient, coupled with some evidence of the identity of the parties, see *post*, p. 339, to produce either the register or an examined copy of the register, or a sealed copy of *the register from the general registry office, which is made [*329 evidence by the 6 & 7 Will. 4, c. 85, s. 38 (repealed), and see now 14 & 15 Vict. c. 99, s. 14, *ante*, p. 165. And a marriage in a chapel where marriages have been usually solemnized, or duly licensed, will stand on the same footing as a marriage in a church. See as to non-parochial registers, 21 & 22 Vict. c. 25; as to licensing by a bishop, 6 & 7 Will. 4, c. 85, s. 36.

If the marriage have taken place in a chapel where marriages have not been usually celebrated, then it is necessary that the chapel should have been duly registered for that purpose under 6 & 7 Will. 4, c. 85, s. 18, and that the marriage took place with open doors between the hours of eight and twelve in the forenoon, in the presence of some registrar of the district in which the chapel is situate, and of two or more credible witnesses. *Id.* s. 20. The marriage may be performed between the parties according to such form and ceremony as they see fit to adopt. *Id.* But, during some part of the ceremony, and in the presence of the registrar and witnesses, each of the parties must declare as follows: "I do solemnly declare, that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D." And each of the parties must say to the other, "I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife [or husband]." By s. 23, the registrar is bound forthwith to register every marriage solemnized in his presence in a marriage register book, of which, under 6 & 7 Will. 4, c. 85, s. 38, a sealed copy may be given in evidence. The certificate was held to be sufficient *prima facie* evidence of the marriage having been duly performed in *R. v. Hawes*, 1 Den. C. C. 279; but it has nevertheless been the general practice to adduce some evidence both of the presence of the registrar and that the chapel was duly registered. In *R. v. Mainwaring*, D. & B. C. C. 132, however, four of the judges were of opinion that proof that the marriage was celebrated in a chapel, in presence of the registrar, was sufficient without proving that the chapel was registered; and this was followed by Willes, J., after consulting Pollock, C. B., in the case of *R. v. Craddock*, 8 F. & F. 837. If it should be necessary to prove that the chapel in which the marriage took place was registered, it may be proved by an examined or certified copy of the register. See 14 & 15 Vict. c. 99, s. 14. Where a witness was called, who produced a certificate by which the superintendent registrar certified that the chapel was duly registered, which certificate did not purport to be an extract from or copy of the register, but which the witness said he received from the superintendent registrar

at his office, and which he compared with the register book and found to be correct, this was held to be sufficient evidence of the due registration of the chapel. *R. v. Mainwaring, supra.*

While the parish church was under repair, divine service had been several times performed by a clerk in holy orders in a chamber at a private hall, and the marriage of the prisoner with his wife was solemnized there. Though there was no evidence that the chamber at the hall was licensed for the performance of divine service or for marriages, it was presumed in favor of the marriage to have been duly licensed. Lord Coleridge, C. J., said: "We are of opinion that the marriage service having been performed in a place where divine service was several times performed, the rule 'omnia presumuntur rite esse acta' applies, and that we must assume that the place was *330] properly licensed, and that the clergyman performing the service was not guilty of the grave offence of marrying persons in an unlicensed place. *R. v. Cresswell*, 13 Cox, C. C. R. 127; see also 1 Q. B. D. 446; 45 L. J., M. C. 77, where the case is not so fully reported.

If the marriage has taken place before the superintendent registrar under 6 & 7 Will. 4, c. 85, s. 21, then the marriage must have taken place in the presence of that officer, and of some registrar of the district, and of two witnesses, with open doors, and between the hours of eight and twelve in the forenoon; and the parties must make the declaration and use the form of words above mentioned. The marriage is registered, like other marriages, under s. 23, of which register, as has already been said, a sealed copy may be given in evidence, *ante*, p. 329. How far the validity of the ceremony would be presumed upon the production of the certificate does not appear to have been yet discussed. If the prisoner should assert that the first marriage was void by reason of a prior marriage he will be allowed to prove that prior marriage by evidence of cohabitation and reputation, although the prosecutor is bound to prove the first marriage strictly. *R. v. Wilson*, 3 F. & F. 119.

Proof of valid marriage—proof that valid ceremony was performed—Jews and Quakers. These persons stand upon a peculiar footing. They have long been in the habit of celebrating marriages according to well-established rituals of their own, and such marriages have been recognized by the legislature. They are excepted out of the operation of the 4 Geo. 4, c. 76, s. 31; and by the 6 & 7 Will. 4, c. 85, s. 2, it is provided, "that the Society of Friends, commonly called Quakers, and all persons professing the Jewish religion, may continue to contract and solemnize marriage according to the usages of the said society and of the said persons respectively; and every such marriage is hereby confirmed and declared good in law, provided that the parties to such marriage, be both members of the said society, or both persons professing the Jewish religion respectively: Provided also, that notice to the registrar shall have been given, and the registrar's certificate shall have been issued in manner hereinafter provided." By

7 Will. 4 & 1 Vict. c. 22, s. 1, for "registrar" is to be read "superintendent registrar" in this section. By the 19 & 20 Vict. c. 119, s. 21, marriages between Jews and Quakers respectively may be solemnized by licence granted by the superintendent registrar in the form given in schedule (C) to that Act. See 23 & 24 Vict. c. 18.

Proof of valid marriage—proof that valid ceremony was performed—marriages in Wales. By the 7 Will. 4 & 1 Vict. c. 22, s. 23, provision is made for an authentic translation of the form of words given in the 6 & 7 Will. 4, c. 85, s. 20 (*ante*), into the Welsh tongue.

Proof of valid marriage—proof that valid ceremony was performed—marriages abroad. The general principle with regard to marriages contracted in a foreign country, *so far as forms are concerned*, is, that, if contracted according to a form which would constitute a valid marriage in the place where it is celebrated, it is a valid marriage here.¹ *Per* Lord Robertson, in *Ferguson on Marriage and Divorce*, p. 397; *Bishop on Marriage and Divorce*, chap. 7; *Brook v. Brook*, 3 Sm. & Giff, 481.

*Another general rule is, that a marriage contracted according to a form which would not constitute a valid marriage in [*331 the country where it was celebrated is invalid. But there are to this rule certain exceptions, which are thus stated by Mr. Bishop, in the work already alluded to, ss. 134 and 99. 1. Where parties are sojourning in a foreign country, where the local law makes it impossible for them to contract a lawful marriage under it. See *acc.* Lord Cloncurry's case, *Cruise on Dignities*, 276, *per* Lord Eldon; where a marriage, celebrated at Rome by a Protestant clergyman between two Protestants, was held valid, *because* a witness swore that, at Rome, two Protestants could not marry according to the *lex loci*. See also *R. v. Mellis*, 10 Cl. & F. 534, *per* Lord Campbell. 2. Where by the law of the country in which the parties are sojourning a mode of marriage is recognized as valid for the sojourners differing from that which is prescribed for citizens. See *per* Lord Stowell, in *Ruding v. Smith*, 2 Hagg. Cons. R. 371, 384. This is only an apparent exception. 3. Where the parties to the marriage belong to an invading army, and they are married according to the forms of the country to which the invading army belongs. *Ruding v. Smith*, *supra*.

¹ 1 Wheel. C. C. 117. The validity of a marriage is to be determined by the law of the place where it was celebrated; if valid there, it is valid everywhere. *Phillips v. Gregg*, 10 W. 158; *Dumarsely v. Fishly*, 3 Marsh. 368; *Medway v. Needham*, 16 Mass. 167. In those of the United States, where there are no marriage acts, consent alone by words *de presenti* or by the words *de futuro*, followed by a cohabitation, makes a valid marriage. *Milford v. Worcester*, 7 Mass. 48; *Londonderry v. Chester*, 2 N. H. 267, 268; *Cheseldine v. Brewer*, 1 H. & McH. 152; *Fenton v. Reed*, 4 Johns. 22; *Benton v. Benton*, 1 Day, 111; *Haate v. Sealy*, 6 Binn. 405; *Dumarsely v. Fishly*, 3 Marsh. 368. The defendant's confession is evidence. See *Commonwealth v. Murtagh*, 1 Ash. 272; *Forney v. Hallacher*, 8 S. & R. 159; *Cayford's Case*, 7 Greenl. 57. *Contra*, *Commonwealth v. Littlejohn*, 15 Mass. 163. S.

Proof of valid marriage—proof that valid ceremony was performed—marriages in colonies. Colonists carry with them so much of the common law, and of the statute law in existence at the time of their formation, as is applicable to their situation. Clark on Col. Law, p. 8; Black. Com. 108. And it appears that the marriage law is included in this. *Lautour v. Teasdale*, 8 Taunt. 830, 4 E. C. L. If the colonial law has been modified, either by the supreme or colonial legislature, this modification must, of course, be attended to. Marriages in Newfoundland are regulated by the 5 Geo. 4, c. 68, repealing 57 Geo. 3, c. 51. Marriages in the Ionian Islands by the 23 & 24 Vict. c. 86.

Proof of valid marriage—proof that valid ceremony was performed—marriages in Scotland. These are subject to the same general considerations as marriages abroad; i. e., the *lex loci* must be looked to. But by s. 1 of the 19 & 20 Vict. c. 96, "after the 31st of December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, usage or custom to the contrary notwithstanding.

Proof of valid marriage—proof that valid ceremony was performed—marriages in Ireland. These are subject also to the same general considerations as marriages abroad. It seems not to have been formerly essential to the validity of marriage in Ireland that the ceremony should take place in a church. Where it had been performed by a dissenting minister in a private room, the recorder was clearly of opinion that it was valid, on the ground that, as before the Marriage Act a marriage might have been celebrated in England in a house, and it was only necessary by positive law to celebrate it in a church, some law should be shown requiring dissenters to be married in a church; whereas one of the Irish statutes, 21 & 22 Geo. 3, c. 25, enacts, that all marriages between Protestant dissenters, celebrated by a Protestant dissenting teacher, shall be good, without saying at what place they shall be celebrated. Anon. O. B. coram Sir J. *332] Silvester, 3 Russ. Cri. 307, 5th ed. So where a marriage was celebrated at a private house in Ireland by a clergyman of the Church of England, the curate of the parish, Best, C. J., held it to be valid. He said, "When I find that this marriage was performed by a gentleman who had officiated as curate of the parish for eighteen years, I must presume it to have been correctly performed according to the laws of that country, and I shall not put the defendant [it was an action in which coverture was pleaded] to the production of a licence, or to any further proof. It is true that in a case for bigamy, tried before Mr. Justice Bayley, on the northern circuit, an acquittal was directed, because the first marriage, which took place in Ireland, was performed in a private house; but I have reason to know that that learned judge

altered his opinion afterwards, and was satisfied of the validity of the first marriage." *Smith v. Maxwell*, Ry. & Moo. N. P. C. 80. The case referred to by Best, C. J., appears to be that of *R. v. Reilly*, 3 Chetw. Burn. 726, in which there was no direct evidence that the law of Ireland permitted a marriage to be celebrated at a private house. In Ireland, the marriage of two Roman Catholics by a Roman Catholic priest is good. Where a person who had a wife living at the time of the second marriage declared himself to be a Roman Catholic, and the woman was a Roman Catholic, Alderson, B., held that this was a good marriage as against him, and that he would not, on being indicted for bigamy, in respect of such second marriage, be allowed to set up, as a defence to the charge, that he was a Protestant. To prove the second marriage the second wife was called, who stated that A. acted as a Roman Catholic priest, and that the marriage took place in his house, as was usual with the marriages of Roman Catholics in Ireland; that before the commencement of the marriage service, the priest asked the prisoner if he was a Roman Catholic, and he answered that he was; that a part of the ceremony was in Latin, and the remainder in English, and that the priest having asked the prisoner if he would take the witness as his wife, and having asked her if she would take the prisoner for her husband, and each having answered in the affirmative, he pronounced them married. Held, that the marriage was sufficiently proved. *R. v. Orgill*, 9 C. & P. 80, 38 E. C. L. Where the first marriage was in Ireland, and it appeared that one of the parties was under age, and no consent of parents was proved, the judges, after referring to the Irish Marriage Act, 9 Geo. 2, c. 11, were of opinion, that though that Act has words to make such a marriage void, yet other parts of the statute show that it is voidable only, and any proceedings to avoid it must be taken within a year; and they therefore held the first marriage binding. *R. v. Jacob*, 1 Moody, C. C. 140.

The 5 & 6 Vict. c. 113, and the 6 & 7 Vict. c. 39, were passed to confirm marriages by Protestant and other dissenting ministers.

Marriages in Ireland are now regulated by the 7 & 8 Vict. c. 81, altered and amended by the 26 Vict. c. 27. See also 26 & 27 Vict. c. 90. The 7 & 8 Vict. c. 81 (which was passed in consequence of the case of *R. v. Millis*, 10 C. & F. 534, in which the question was, as to the validity of a present contract of marriage performed by a Presbyterian minister) is similar to the 6 & 7 Will. 4, c. 85 (*ante*, p. 329), which relates to England. It specially provides for marriages in Ireland between parties, one or both of whom are Presbyterians, permitting such marriages to be solemnized in certified meeting-houses. It allows the celebration of marriage, under certain forms and regulations, to take place in registered buildings, and before the registrar at his office. By s. 3, however, it is enacted, "that nothing in this Act contained shall affect any marriages by any Roman Catholic priest which may now be lawfully celebrated, nor extend to the registration of any Roman Catholic chapel, but such marriages may continue to be celebrated in the same manner, and subject

to the same limitations and restrictions, as if this Act had not been passed." By ss. 45, 46, and 47, persons unduly solemnizing marriage, and registrars unduly issuing certificates of marriage, in Ireland, are made guilty of felony.

And now by the 26 Vict. c. 27, s. 7, "Every marriage solemnized by virtue of a registrar's certificate of publication of notice, or of a registrar's licence, according to the usages of any church, denomination, or body of Protestant Christians, shall be solemnized.

- (1.) By a minister of the church, denomination or body to which the parties to the marriage, or either of them shall belong ;
- (2.) In the registered place of public worship named in the notice ;
- (3.) Between the hours of eight in the morning and two in the afternoon ;
- (4.) With open doors ;
- (5.) In the presence of two or more credible witnesses besides the officiating minister or person solemnizing the marriage ;

And not elsewhere or otherwise. If any person wilfully solemnize a marriage, or pretended marriage, contrary to the present provision, he shall be guilty of felony."

Proof of valid marriage—proof that valid ceremony was performed—marriages abroad in houses of ambassadors, etc. It appears that before the passing of the statute 4 Geo. 4, c. 91, a marriage celebrated in the house of an English ambassador abroad was held valid. *R. v. Inhab. of Brampton, 10 East, 282* ; *Ruding v. Smith, 2 Hagg. Cons. Rep. 371*. And now, by the first section of that statute, reciting that "it is expedient to relieve the minds of all his majesty's subjects from any doubt of the validity of marriages solemnized by a minister of the Church of England in the chapel or house of any British ambassador, or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad ;" it is enacted, "that all such marriages shall be deemed and held to be as valid in law, as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law."

Sect. 2 provides that the Act shall not confirm, or impair, or affect the validity of any marriage solemnized beyond the seas, save and except such as are solemnized as therein specified and recited.

Proof of valid marriage—proof that a valid ceremony was performed—marriages abroad before a consul. By the 12 & 13 Vict. c. 68 (amended by 31 & 32 Vict. c. 61, *infra*), it is provided, that all marriages abroad solemnized between parties either of whom may be
 *334] a British subject, in the manner pointed out by that Act, shall be *valid. The provisions in this Act accord almost pre-

cisely with those in the 6 & 7 Will. 4, c. 85, relating to a marriage before the superintendent registrar. See s. 11, partly repealed. By the 31 & 32 Vict. c. 61, marriages are valid if performed by any person purporting to act in the place of the proper consul, and every such person shall be deemed to be a consul.

Proof of valid marriage—preliminary ceremonies. Sometimes, in addition to the actual ceremony by which the marriage is required to be celebrated, some preliminary ceremony is necessary to the validity of the marriage, as a licence, banns, etc. It is a general rule that where a marriage is shown to have been regularly celebrated, the performance of the preliminary conditions will be presumed; and it is for the party who seeks to repudiate the marriage to show that they were not fulfilled. As to when the absence of these preliminary ceremonies avoids the marriage, see *post*.

What marriages are voidable. There are many marriages which for civil purposes are *voidable*, but not *void*. That is, they are valid until some step has been taken to annul them. But many such marriages might be valid for the purposes of bigamy. Whether or no a marriage is void for the purposes of bigamy would sometimes raise very difficult questions. It is clear that all marriages within the prohibited degree would be invalid. But it appears from *R. v. Brawn* and *R. v. Allen*, that, if the first marriage be valid, it makes no difference that the second marriage was within the prohibited degrees. *Vide supra*, p. 327. On the other hand, if a man marry his deceased wife's sister, and in the latter's lifetime marry another woman, he cannot then be indicted for bigamy. *R. v. Chadwick*, 11 Q. B. 173, 63 E. C. L.; 17 L. J., M. C. 33.

A marriage celebrated by a Roman Catholic priest in Ireland, between a Roman Catholic and a person who within twelve months has professed himself a Protestant, is null and void to all intents and purposes (19 Geo. 2, c. 13, s. 1); and where a married man entered into such a marriage and was convicted for bigamy the conviction was quashed. *R. v. Fanning*, 10 Cox, C. C. 411; 17 Ir. C. L. 289. But this case has been strongly disapproved of in a very recent case, because the marriage disputed was the second marriage (see *ante*, p. 327); but it is stated by the Court in *R. v. Allen*, *supra*, p. 327, that there may be a distinction in the two cases, and that in *R. v. Fanning* the ceremony was one forbidden by a statute, and ineffectual to create a valid marriage, and not a ceremony known to and recognized by the law.

Although it was formerly held that the marriage of an idiot was valid, yet, according to modern determination, the marriage of a lunatic, not in a lucid interval, is void. 1 Bl. Com. 438, 439; 3 Russ. Cri. 313, 5th ed. And by the 51 Geo. 3, c. 37, if persons found lunatics under a commission, or committed to the care of trustees by any Act of parliament, marry before they are declared of sound mind by the lord chancellor, or the majority of such trustees, the marriage shall be totally void.

It was held, under the former law, that where the second marriage was contracted in Ireland, or abroad, it was not bigamy, on the ground that that marriage, which alone constituted the offence, was a fact done in another jurisdiction, and though inquirable into here for *335] some purposes, like all transitory acts, was not, as a crime, cognizable by the rules of the common law. 1 Hale, P. C. 692; 1 East, P. C. 465. But now the offence is the same, whether the second marriage shall take place in England or elsewhere, if such marriage be contracted by a British subject.

What marriages are void—marriages by banns. By the 22nd section of the Marriage Act, 4 Geo. 4, c. 76, "if any person shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by a special licence, or shall knowingly and wilfully intermarry without a publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnization of such marriage by any person not being in holy orders, the marriage of such person shall be null and void."

With regard to the chapels in which banns may be lawfully published, it is enacted, by the 6 Geo. 4, c. 92, s. 2, that it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 Geo. 2, c. 33, and consecrated, in which churches and chapels it has been customary and usual before the passing of that Act (6 Geo. 4) to solemnize marriages, and the registers of such marriages, or copies thereof, are declared to be evidence. By sect. 3 of the Marriage Act, 4 Geo. 4, c. 76, "the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which any public chapel having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize by writing under his hand and seal the publication of banns, and the solemnization of marriages in such chapels for persons residing in such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese."

To render a marriage without due publication of banns void, it must appear that it was contracted with a knowledge by *both* parties that no due publication had taken place. *R. v. Wroxton*, 4 B. & Ad. 640, 24 E. C. L. And, therefore, where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that fact until after that solemnization of the marriage; it was held to be a valid marriage. *Id.*; and see *Wiltshire v. Prince*, 3 Hagg. Ecc. R. 332. If the prisoner has been instrumental in procuring the banns of the second marriage to be published in a wrong name, he will not be allowed, on an indictment for bigamy, to take advantage of that objection to invalidate such second marriage. The prisoner was indicted for marrying

Anna T., his former wife being alive. The second marriage was by banns, and it appeared that the prisoner wrote the note for the publication of the banns, in which the wife was called Anna, and that she was married by that name, but that her real name was Susannah. On a case reserved, the judges held unanimously that the second marriage was sufficient to constitute the offence, and that after having called the woman Anna in the note, it did not lie in his mouth to say that she was not as well known by the name of Anna, as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment. *R. v. Edwards*, Russ. & Ry. 283; 3 Russ. Cri. 297, 5th ed. This principle was carried still further in a case [*336 before Mr. Baron Gurney. The second wife, who gave evidence on the trial, stated that she was married to the prisoner by the name of Eliza Thick, but that her real name was Eliza Brown; that she had never gone by the name of Thick, but had assumed it when the banns were published, in order that her neighbors might not know that she was the person intended. It being objected, on behalf the prisoner, that this was not a valid marriage, Gurney, B., said, "that applies only to the first marriage, and I am of opinion that the parties cannot be allowed to evade the punishment for the offence by contracting an invalid marriage." *R. v. Penson*, 5 C. & P. 412, 24 E. C. L. In another case, where the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved, on a reference to the judges, that the prisoner had been rightly convicted on this evidence. *R. v. Palmer*, *coram* Bayley, J., Durham, 1827, 1 Deacon's Dig. C. L. 147. A person whose name was Abraham Langley was married by banns by the name of George Smith; he had been known in the parish where he resided and was married by the latter name only; the Court of Queen's Bench held this was a valid marriage under the 26 Geo. 2. *R. v. Billingshurst*, 3 M. & S. 250. As to the distinction between a name assumed for other purposes, and a name assumed for the purpose of practising a fraud upon the marriage laws, see the case of *R. v. Burton-on-Trent*, *post*, p. 337. Where the banns were published in the name of William, the real name being William Peter, and the party being known by the name of Peter, and the suppression was for the purpose of effecting a clandestine marriage with a minor, the marriage was declared null and void. *Pouget v. Tomkins*, 1 Phillimore, 449. See also *Fellowes v. Stewart*, 2 Phillimore, Ec. Ca. 257; *Middlecroft v. Gregory*, Id. 365. So where the wife at the time of her marriage personated another woman in whose name banns had been previously published for an intended marriage with her husband. *Stayte v. Farquharson*, 3 Addams, 282. See *Midgley v. Wood*, 30 L. J., D. & M. 57.

What marriages are void—marriages by minors. Under the former Marriage Act, 26 Geo. 2, c. 33, it was held that if the marriage was by licence, and the prisoner proved that he was a minor at the time, it lay on the prosecutor to show that the consent required by the

11th section of the above Act had been obtained, *R. v. Butler*, Russ. & Ry. 61; *R. v. Morton*, Id. 19 (n); *R. v. James*, Id. 17; *Smith v. Huson*, 1 Phillimore, 287. The law on this point has been altered by the Marriage Act, 4 Geo. 4, c. 76, s. 14, which merely requires consent, and has no words making marriages solemnized without such consent, *void*. The statute therefore is regarded as *directory* only, and a marriage by a minor without the consent of his father, then living, has been held valid. *R. v. Birmingham*, 8 B. & C. 29, 15 E. C. L.; 2 Man. & Ry. 230. So in the interval between the time of the 3 Geo. 4, c. 75 (by which certain parts of the 26 Geo. 2, c. 33, relating to consent of parents, etc., were repealed), receiving the royal assent, and at the time when it began to operate, a marriage by licence, solemnized without consent, it was held valid, *R. v. Waully*, 1 Moo. C. C. 163.

By the 6 & 7 Will. 4, c. 85, s. 10, the like consent shall be required to any marriage in England solemnized by licence, as would have *337] been required by law to marriages solemnized by licence immediately before the passing of the Act; and every person whose consent to the marriage by licence is required by law, is thereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by licence, or without licence.

The repealed statute 1 Jac. 1, c. 11, contained an exception with regard to persons within what was then considered the age of consent, namely fourteen years in a male, and twelve years in a female. 1 Bl. Com. 436; *R. v. Gordon*, Russ. & Ry. 48. The subsequent statutes defining the crime of bigamy do not contain this exception. But probably a marriage within that age would be considered as wholly void, the presumption being that the parties are incapable of sexual intercourse.

What marriages are void—marriage by licence, in an assumed name. A man who had deserted from the army, for the purpose of concealment, assumed another name. After a residence of sixteen weeks in the parish he was married by licence in his assumed name, by which only he was known in the place where he then resided. Lord Ellenborough said, "If this name had been assumed for the purpose of fraud, in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the Marriage Act and the rights of marriage, and the court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to become the name which the party has acquired by reputation, that is, within the meaning of the Act, the party's real name." *R. v. Burton-upon-Trent*, 3 M. & S. 527. See *Bevan v. M'Mahon*, 30 L. J., D. & M. 61.

What marriages are void—marriages abroad. Whether or no a marriage which has taken place abroad, according to a form which

would be considered valid there, and therefore valid here, but between parties who, though competent there, would in this country be incompetent to contract a valid marriage, is to be considered void or not in this country, is a very difficult question. The question was very elaborately discussed in the case of *Brook v. Brook*, 3 Sm. & Giff. 481; 27 L. J. Ch. 401; and all the authorities will be found in the learned judgment of Sir Cresswell Cresswell, in giving his opinion in that case. There an English subject had married his deceased wife's sister at Altona, in Denmark, and it was held that, assuming the marriage to be valid there, it was nevertheless null and void in this country, by reason of the provisions in the 5 & 6 Will. 4, c. 54. See also In the goods of Bernhard Mette, 1 Swab. & Trist. 112. But the difference already alluded to between holding a marriage void for civil purposes, and for the purposes of a prosecution for a bigamy, must be borne in mind.¹

Foreign law—how proved. In proving a marriage which has taken place abroad, evidence must be given of the law of the foreign state, in order to show its validity. For this purpose, a person skilled in the laws of the country should be called. *Lindo v. Belisaro*, 2 Hagg. 248; *Middleton v. Janvers*, 2 Hagg. 441. Some doubt has existed with regard to the mode of proving foreign laws in English courts. The rule formerly appeared to be, that the written law of a foreign state must be proved by a copy duly authenticated. *Clegg v. Levy*, 3 Camp. 166. With regard to the mode of authenticating it, the following case occurred. In order to prove the law of France respecting marriage, the French vice-consul was called, who produced a copy of the Cinq Codes, which, he stated, contained the customary and written laws of France, and was printed under the authority of the French government. *R. v. Sir Thomas Picton*, 30 How. St. Tr. 514, was referred to as an authority in favor of admitting this evidence, but it appears that there the evidence was received by consent. Abbott, J., said that the general rule certainly was, that the written law of a foreign country must be proved by an examined copy, before it could be acted on in an English court, but, according to his recollection, printed books on the subject of the law of Spain were referred to and acted on in argument in *R. v. Sir T. Picton*, as evidence of the law of that country, and therefore he should act on that authority, and receive the evidence. *Lacon v. Higgins*, Dowl. & Ry. N. P. C. 38; 3 Stark. 178, 3 E. C. L. The House of Lords, in the *Sussex Peerage* case, 11 Cl. & Fin. 134, held that a witness to foreign law must be a person *peritus virtute officii*, or *virtute professionis*. And it was there held that a Roman Catholic bishop, holding in this country the office of coadjutor to a vicar apostolic, and, as such, authorized to decide on cases arising out of marriages affected by the law of Rome, was therefore, in virtue of his office, a witness admissible to prove the law of Rome as to marriages. In the same case it was held (overruling the above case of *Clegg v. Levy*) that a

¹ *Sneed v. Ewing*, 5 J. J. Marsh. 447. S.

professional or official witness giving evidence as to foreign law may refer to foreign law books or codes to refresh his memory, or to correct or confirm his opinions, but the law itself must be taken from his evidence. In *R. v. Povey*, 1 Dears & B. C. C. 32; 22 L. J., M. C. 19; it was held that, in order to prove that a marriage in Scotland was valid according to the law, the witness must be one conversant with the law of Scotland as to marriages. In this case a woman was called as a witness, who said, that she was present at a ceremony performed in a private house in Scotland by a minister of some religious denomination, that she herself was married in the same way, and that parties always married in Scotland in private houses; this was held by the Court of Criminal Appeal insufficient, and the conviction was quashed. In *R. v. Griffiths*, 14 Cox, C. C. R. (Ir.) 308, a marriage contracted according to the rites of the Roman Catholic Church in a foreign state was presumed to be good without proof of the law of the foreign state.

The practice with regard to proof of foreign laws in the United States is as follows:—The usual modes of authenticating foreign laws there are by an exemplification under the great seal of state; or by a copy proved to be a true copy; or by the certificate of an officer authorized by law, which certificate itself must be duly authenticated. But foreign unwritten laws, customs, and usages, may be proved, and indeed must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath; sometimes, however, certificates of persons in high authority have been allowed as evidence. Story on the Conflict of Laws, 530.¹

Marriage confirmation Acts. Many Acts of parliament have been *passed expressly to confirm and render valid marriages about *339] which doubts might have existed; such as the 44 Geo. 3 c. 77; 48 Geo. 3, c. 127; 4 Geo. 4, c. 5; 4 Geo. 4, c. 91; 28 & 29 Vict. c. 64 (marriages abroad); 6 Geo. 4, c. 92; 11 Geo. 4 & 1 Will. 4, c. 18; 3 & 4 Will. 4, c. 45 (Hamburgh); 5 & 6 Will. 4, c. 54; 10 & 11 Vict. c. 58 (Jews and Quakers); 12 & 13 Vict. c. 68, s. 20; 21 & 22 Vict. c. 46; 22 & 23 Vict. c. 64; 31 & 32 Vict. c. 61; 42 & 43 Vict. c. 29.

II. THE IDENTITY OF THE PARTIES.

Identity of parties. The identity of the parties named in the indictment must be proved. Upon an indictment for bigamy, it was proved by a person who was present at the prisoner's second marriage, that a woman was married to him by the name of Hannah Wilkinson, the name laid in the indictment, but there was no other proof that the woman in question was Hannah Wilkinson, or that she had ever called herself so. Parke, J., held the proof to be insufficient, and directed

¹ A certificate of marriage in another State, where no record is required to be kept by law, is not admissible. *Tucker v. People*, 117 Ill. 88.

an acquittal. He subsequently expressed a decided opinion that he was right; and added, that to make the evidence sufficient, there should have been proof that the prisoner "was then and there married to a certain woman *by the name of, and who called herself, Hannah Wilkinson,*" because the indictment undertakes that a Hannah Wilkinson was the person, whereas, in fact, there was no proof that she had ever before gone by that name; and if the bands had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. *R. v. Drake*, 1 Lew. C. C. 25.

If in a case of bigamy there be a discrepancy between the Christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the register which is produced to prove the first marriage, the prisoner must be acquitted; *unless* that discrepancy can be explained, or unless it can be shown that the first wife was known by both names. *R. v. Gooding*, Carr. & M. 297, 41 E. C. L. On an indictment for bigamy a photograph which had been taken from the prisoner, and which she had said was that of her husband, was allowed to be shown to a witness present at the first marriage, and also to another witness who had known the man of whom the photograph was a likeness, in order to prove his identity with the person mentioned in the marriage certificate. *R. v. Tolson*, 4 F. & F. 103.

III. PROOF THAT FIRST WIFE IS ALIVE.

Proof that the first wife is alive. It is necessary to show that the first wife is alive at the time of the second marriage. Although the statute sanctions a presumption that a person who has not been heard of during seven years is dead, yet there is no presumption of law that when a person has been seen within seven years he is alive, and he must be shown to be alive as a matter of fact from the circumstance of the case. *R. v. Lumley*, L. R. 1 C. C. R. 196; 38 L. J., M. C. 86. See *Phené's Trust*, L. R. 5 Ch. 150. The prisoner was indicted for bigamy in 1880. It was proved that he was married to Charlotte Lavers in 1879, and that this wife was alive. It was held that this must be presumed (or rather should be inferred by the jury) to be a *good marriage. But the prisoner showed that in 1864 he had married Ellen Earle, and that at all events in 1868 she was [*340 alive. Therefore there were two conflicting inferences:—1st. That the marriage in 1879 was a good one; 2ndly. That it was not a good marriage, as Ellen Earle might be presumed to have been still alive. It was held to be a question for the jury, which inference should have the greatest weight. *Reg. v. Willshire*, 6 Q. B. D. 366; 50 L. J., M. C. 57.

IV. PROOF AFTER ABSENCE OF SEVEN YEARS.

Proof after absence of seven years. Where the wife is proved to have been continually absent for seven years, it is for the prosecution to show not only that the wife is alive, but that the prisoner knew

it at the time he contracted the second marriage. *R. v. Curgerwen*, L. R. 1 C. C. R. 1; 35 L. J., M. C. 58.¹ *R. v. Jones*, 11 Cox, C. C. R. 358. But the law laid down in *R. v. Curgerwen* does not apply in the absence of evidence that the parties were continually absent. *R. v. Jones*, 11 Q. B. D. 118; 52 L. J., M. C. 96.

Venue. The 24 & 25 Vict. c. 100, s. 57, *supra*, p. 327, like the 9 Geo. 4, c. 31, and the 1 Jac. 1, c. 11, enacts that the prisoner may be tried in the county in which he is apprehended.²

Upon the latter statute, it was held that the prisoner, having been apprehended for larceny in the county of W., and a true bill having been found against him while in custody under that charge for bigamy, he might be tried for the latter offence in the county of W. *R. v. Jordan, Russ. & Ry.* 48. The second marriage was at Manchester, and a warrant was issued by a magistrate there to apprehend the prisoner. He having removed to London, surrendered to one of the police magistrates there, who admitted him to bail. On his trial at the Old Bailey, the court, on an objection taken by his counsel, were of opinion, that as *the warrant* had not been produced, and as it had not been proved that the prisoner was *apprehended* in the county of Middlesex, the court had no jurisdiction to try him. *R. v. Forsyth*, 2 Leach, 826. But now the prisoner may be tried in the county in which he is *in custody*. See the statute, *supra*, p. 327.

But on a crown case reserved, eleven of the judges being present, it was decided (Parke, B., Alderson, B., and Maule, B., *diss.*), that an indictment for bigamy, found in a different county from that where the offence was committed, need not allege that the prisoner was in custody in the county where the indictment was found. *R. v. Whiley*, 1 C. & K. 150, 47 E. C. L.; 2 Moo. C. C. 186. In the marginal note of this case, given in 2 Moo. C. C. the word "not" is omitted, and it is in other respects erroneously reported. *Per Parke, B.*, in *R. v. Smythies*, 1 Den. C. C. R. 499.

Under the former law the offence of bigamy was not committed if the second marriage took place out of the jurisdiction of the criminal courts of this country; 1 Hale, P. C. 692; 1 East, P. C. 645. But by the present statute this is specially provided for.

A British subject resident in England married a second wife in the lifetime of the first; both marriages took place in Scotland; it was held that he might be indicted and convicted of bigamy in England. *R. v. Topping*, 25 L. J., M. C. 72.

Proof in defence under the exceptions. The prisoner may prove

¹ A man who in good faith marries and cohabits with a woman whose husband has remained absent for more than seven years together, without being heard from, and is believed by both parties to be dead, cannot be convicted of the crime of adultery therefor, although in fact her husband is still living. *Commonwealth v. Thompson*, 6 Allen, 591. S.

² Bigamy is not punishable as an offence when the second marriage took place out of the State, though the husband brought his second wife here and lived with her. *People v. Mosher*, 2 Park. C. R. 196. A

*under the first exception in the statute that he or she is not a subject of her majesty, *and* that the second marriage was not [*341 contracted in England or Ireland.

Secondly, the prisoner may prove that the other party to the first marriage has been continually absent from home for the space of seven years last past, *and* was not known to be living within that time. The question, whether a prisoner, setting up this defence, ought to show that he has used reasonable diligence to inform himself, as to the other party being alive, and whether, if he neglects the palpable means of availing himself of such information, he will stand excused, was, until lately, an undecided point. (*See R. v. Cullen*, 9 C. & P. 681, 38 E. C. L.; *R. v. Jones*, Carr. & M. 614, 41 E. C. L.; *R. v. Briggs*, Dears. & B. C. C. 98.) But where the wife was absent for seven years, it was decided that the burden of proving that the prisoner did know that his wife was alive within the seven years is on the prosecution, and that in the absence of evidence to that effect, he must be acquitted. *R. v. Curgewen*, *ante*, p. 340. The mere fact that there are no circumstances leading to the inference that the absent party has died, does not raise a presumption of law that such party is alive. The prosecution must satisfy the jury that as a matter of fact such party is alive, and it is a question entirely for them. Where the only evidence is that the party was alive more than seven years ago, then there is no question for the jury, and it is a presumption of law that he is dead. *R. v. Lumley*, L. R. 1 C. C. R. 196; 38 L. J., M. C. 86.

It is submitted that it is good defence that the prisoner at the time of the second marriage honestly and *bona fide* believed that his first wife was dead, and had reasonable grounds for so believing. *Per* Cleasby, B., in *R. v. Hoxton*, 11 Cox, C. C. 670, following Martin, B., in *R. v. Turner*, 9 Cox, C. C. 145; but although these two decisions were cited, Brett, J., after consulting Willes, J., decided the contrary in *R. v. Gibbons*, 12 Cox, C. C. 237; and see *R. v. Jones*, 11 Cox, C. C. R. 358. In the case of *R. v. Moore*, reported in 13 Cox, C. C. 544, tried at Lincoln before Mr. Justice Denman, the learned judge, after taking time to consider the above authorities, and after consulting Amphlett, J. A., said, that if he had intended to inflict any punishment he should reserve a case; and that he and his brother judge were of opinion that a reasonable belief was a good defence. In this case evidence was given of a letter having been received announcing the death of the prisoner's first husband. In a still more recent case (*Reg. v. Bennett*, 14 Cox, C. C. 45), Bramwell, L. J., ruled the other way; but it should be noticed that the case *Reg. v. Moore*, *supra*, was not cited, and the prisoner was also found guilty of forgery and false pretences, so that no doubt his belief on the subject of his first wife's death did not appear to be very material. It is immaterial for how long or how short a time the first wife has been absent, except in so far as length of absence may tend to show the reasonableness of the belief. It is remarkable that in the elaborate judgment of Brett, J. A., in *R. v. Prince* (*ante*, tit. "Abduction"), in which he maintained the doctrine *actus non facit reum nisi mens sit rea*, that learned judge does not

allude to his reported ruling in *R. v. Gibbons*, *supra*. The doctrine would seem to be even more applicable in the latter case, because the act of marriage is in itself innocent, but in abduction the act itself is wrong. It has been suggested, however, that in *R. v. Gibbons* it was not clearly shown that the prisoner reasonably believed in the *death, but it seems she was simply ignorant on the subject. *342] See Dig. of Crim. Law, p. 21, Sir J. F. Stephen.

The third exception is, where the party, at the time of the second marriage, has been divorced from the bond of the first marriage. The words of the 1 Jac. 1, c. 11 (repealed), were "divorced by the sentence of any ecclesiastical court," and were held to extend to a divorce *à mens et thoro*. 1 Hale, P. C. 694; 4 Bl. Com. 164; 1 East, P. C. 467. But now a divorce *à vinculo matrimonii* must be proved. It is not always sufficient to prove a divorce out of England, where the first marriage was in this country. The prisoner was indicted for bigamy under the statute of 1 Jac. 1, c. 11 (repealed). It appeared that he had been married in England, and that he went to Scotland, and procured there a divorce *à vinculo matrimonii*, on the ground of adultery, before his second marriage. This, it was insisted, for the prisoner, was a good defence under the third exception in the statute of 1 Jac. 1; but, on a case reserved, the judges were unanimously of opinion that no sentence or Act of any foreign country could dissolve an English marriage *à vinculo matrimonii*, for ground on which it was not liable to be dissolved *à vinculo matrimonii* in England, and that no divorce of an ecclesiastical court was within the exception in sect. 3 of 1 Jac. 1, unless it was the divorce of a court within the limits to which the 1 Jac. 1 extends. *R. v. Lolley*, Russ. & Ry. 237.

The fourth exception is, where the former marriage has been declared void by the sentence of any court of competent jurisdiction. The words in the statute of 1 Jac. 1, c. 11 (repealed), were, "by sentence in the ecclesiastical court;" and under these it was held that a sentence of the spiritual court against marriage, in a suit of jactitation of marriage, was not conclusive evidence, so as to stop the counsel for the crown from proving the marriage, the sentence having decided on the validity of the marriage only collaterally, and not directly. *Duchess of Kingston's case*, 11 St. Tr. 262, fo. ed.; 20 How. St. Tr. 355; 1 Leach, 146.¹

¹ On an indictment for bigamy, evidence that the defendant's marriage with the second wife had not been consummated by carnal knowledge of her body, is irrelevant. *State v. Patterson*, 2 Ired. 346. S.

*BRIBERY.

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Nature of the offence. Bribery is a misdemeanor punishable at common law. Bribery in strict sense, says Hawkins, is taken for a great misprision of one in a judicial place, taking any valuable thing except meat and drink of small value of any man who has to do before him in any way, for doing his office, or by color of his office. In a large sense, it is taken for the receiving or offering of any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of justice, in order to incline him to do a thing against the known rules of honesty and integrity. Also bribery sometimes signifies the taking or giving a reward for offices of a public nature. Hawk. P. C. b. 1, c. 67, ss. 1, 2, 3.

An attempt to bribe is a misdemeanor, as much as the act of successful bribery, as where a bribe is offered to a judge, and refused by him. 3 Inst. 147. So it has been held, that an attempt to bribe a cabinet minister, for the purpose of procuring an office, is a misdemeanor. Vaughan's case, 4 Burr. 2494. So an attempt to bribe, in the case of an election to a corporate office, is punishable. Plumpton's case, 2 Ld. Raym. 1377.

Bribery at elections for members of parliament. By the Corrupt Practices Prevention Act, 1883 (46 & 47 Vict. c. 51, s. 1):—

(1.) Any person who corruptly by himself or by any other person, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any meat, drink, entertainment or provision to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be guilty of treating.

(2.) And every elector who corruptly accepts or takes any such meat, drink, entertainment or provision shall also be guilty of treating.

Sect. 2. Every person who shall directly or indirectly, by himself, or by any other person on his behalf, make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account

of such person having voted or refrained from voting at any election, or who shall by abduction, duress, or any fraudulent device or contrivance impede or prevent the free exercise of the franchise of any *elector, or shall thereby compel, induce, or prevail upon any *344] elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence.

Sect. 3. The expression "corrupt practice," as used in this Act, means any of the following offences, namely, treating and undue influence as defined by this Act, and bribery, and personation, as defined by the enactments set forth in Part III. of the Third Schedule to this Act, and aiding, abetting, counselling, and procuring the commission of the offence of personation, and every offence which is a corrupt practice within the meaning of this Act shall be a corrupt practice within the meaning of the Parliamentary Elections Act, 1868. The principal enactment referred to in the above section as being contained in Part III. of the Third Schedule is the 17 & 18 Vict. c. 102, which by sect. 2 defines the offence of bribery, and enacts that the following persons shall be deemed guilty of bribery. 1. Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, to or for any other person, in order to induce any voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election; 2. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavor to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election; 3. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement, as aforesaid, to or for any person, in order to induce such person to procure, or endeavor to procure, the return of any person to serve in parliament, or the vote of any voter at any election; 4. Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavor to procure, the return of any person to serve in parliament, or the vote of any voter at any election; 5. Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election. (The concluding portion of the above section provided for the punishment of persons guilty of any of the above offences. This portion of the section has been repealed,

and the punishment is given by s. 6 of the Corrupt Practices Prevention Act, 1883, *infra*.)

By s. 3 of the 17 & 18 Vict. c. 102, the following persons are also to be deemed guilty of bribery :—1. Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment, for himself or for any other person, for voting or agreeing to vote, or for *refraining or agreeing to refrain from voting at any election ; [*345
2. Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting, at any election.

By sect. 10, no indictment for bribery or undue influence shall be triable before any court of quarter sessions. This section is extended to prosecutions on indictment for the offences of corrupt practices within the meaning of the 46 & 47 Vict. c. 51, by sec. 53.

In *R. v. Leatham*, 3 L. T. 504 ; 3 L. T. 777 ; 30 L. J., Q. B. 205, many questions were raised upon this act of parliament. The defendant was indicted for having on the 26th of April, 1859, paid to one T. G. money with the intent that it should be applied in bribery at an election. There were several other counts in which the defendant was charged with actual bribery of several persons named in those counts. The defendant was found guilty generally. Upon a motion for a new trial, it was objected that the offence was committed, if at all, more than a year before the filing of the information, and issuing the process on it. With respect to this objection, the Court of Queen's Bench said that, as it was upon the record, advantage could be taken of it in arrest of judgment, or by writ of error, and they would not interfere ; but a strong opinion was expressed that sect. 14 did not apply to criminal proceedings, but only to the recovery of a penalty or forfeiture in a civil suit. The second objection was that as the defendant was found guilty upon the first count, he could not also be guilty of the offences charged in the other counts, as it appeared that there was but one act, namely, the payment of the money by the prisoner to the agent, but the court thought that this objection, if available at all, was only available at the trial by application to compel the prosecutor to elect upon which of the charges he would proceed ; and the court said that it was quite possible that one act might produce several distinct offences. The third objection, that as it appeared from the evidence that the defendant had paid the money to T. G., and T. G. had employed subordinate agents to bribe, the defendant could not be found guilty of having bribed the voters himself. But the court thought that bribing by an agent was the same thing as bribing directly. (See now, however, s. 51 of the 46 & 47 Vict. c. 51, *infra*.) At a later stage of the proceedings in the same case, it was held that, because the defendant had, at the inquiry before the commissioners into the proceedings at his election, stated the substance of two letters between himself and one W., which were after-

wards produced before the commissioners on their demand, these letters were not thereby rendered inadmissible against him on an indictment for bribery, under the proviso to the 15 & 16 Vict. c. 57, s. 8.

By the Corrupt Practices Act, 1883, Sect. 6, (1.) A person who commits any corrupt practice other than personation, or aiding, abetting, counselling, or procuring the commission of the offence of personation, shall be guilty of a misdemeanor, and on conviction on indictment, shall be liable to be imprisoned, with or without hard labor, for a term not exceeding one year, or to be fined any sum not exceeding two hundred pounds.

(Sub-s. 2.) A person who commits the offence of personation, or of aiding, abetting, counselling, or procuring the commission of that offence, shall be guilty of felony, and any person convicted thereof on *346] indictment shall be punished by imprisonment for a term not exceeding two years, together with hard labor.

(Sub-ss. 3 and 4.) Persons so convicted are subject to certain incapacities.

Sect. 50 of the Corrupt Practices Prevention Act, 1883, provides for the removal of proceedings in certain cases to the Central Criminal Court or the Royal Courts of Justice.

Sect. 51. (1.) A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence under the Corrupt Practices Prevention Acts or this Act shall be commenced within one year after the offence was committed, or, if it was committed in reference to an election with respect to which an inquiry is held by election commissioners, shall be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed, and the time so limited by this section shall, in the case of any proceeding under the Summary Jurisdiction Acts for any such offence, whether before an election court or otherwise, be substituted for any limitation of time contained in the last-mentioned Acts.

(2.) For the purposes of this section the issue of a summons, warrant, writ, or other process shall be deemed to be a commencement of a proceeding, where the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender, but save as aforesaid the service or execution of the same on or against the alleged offender, and not the issue thereof, shall be deemed to be the commencement of the proceeding.

Sect. 52. Any person charged with a corrupt practice may, if the circumstances warrant such finding, be found guilty of an illegal practice (which offence shall for that purpose be an indictable offence), and any person charged with an illegal practice may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt practice, and a person charged with illegal payment, employment, or hiring, may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt or illegal practice.

Sect. 53. (1) Sections ten, twelve, and thirteen of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), and section six of the Corrupt Practices Prevention Act, 1863 (26 & 27 Vict. c. 29), (which relate to prosecutions for bribery and other offences under those Acts), shall extend to any prosecution or indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned, and an order under the said section ten may be made on the defendant; but the Director of Public Prosecutions or any person instituting any prosecution in his behalf, or by direction of an election court shall not be deemed to be a private prosecutor, nor required under the said sections to give any security.

(2.) On any prosecution under this Act, whether on indictment or summarily, and whether before an election court or otherwise, and in any action for a pecuniary forfeiture under this Act, the *person prosecuted or sued, and the husband or wife of such person may, if he or she think fit, be examined as an ordinary [*347 witness in the case. .

(3.) On any such prosecution or action as aforesaid it shall be sufficient to allege that the person charged was guilty of an illegal practice, payment, employment, or hiring within the meaning of this Act, as the case may be, and the certificate of the returning officer at an election, that the election mentioned in the certificate was duly held, and that the person named in the certificate was a candidate at such election, shall be sufficient evidence of the facts therein stated.

Sect. 55. (2.) *The enactments relating to charges before justices against persons for indictable offences shall, so far as is consistent with the tenor thereof, apply to every case where an election court orders a person to be prosecuted on indictment in like manner as if the court were a justice of the peace.

By sect. 56 the jurisdiction of the High Court may be exercised by a judge or master in certain cases.

By sect. 57 (1.), the duties of the director of public prosecutions are defined. By sub-s. 2, subject to the provisions of this Act, the costs of any prosecution on indictment for any offence punishable under this Act, whether by the director of public prosecutions or his representative, or by any other person, shall so far as they are not paid by the defendant be paid in like manner as costs in the case of a prosecution for felony are paid.

By sect. 58 (1.), provision is made for costs other than costs of a prosecution on indictment.

(2.) Where any costs or other sums are under the order of an election court or otherwise under this Act, to be paid by any person, those costs shall be a simple contract debt due from such person to the person or persons to whom they are to be paid, and if payable to the

Commissioners of Her Majesty's Treasury shall be a debt to Her Majesty, and in either case may be recovered accordingly.

The Corrupt Practices Act, 1883 (46 & 47 Vict. c. 51), contains many provisions respecting corrupt and illegal practices at elections which are punishable upon summary conviction before the election court, and therefore do not come within scope of the present work. By a proviso to s. 43 in the case of corrupt practices the defendant has an option of being tried by a jury, and by sub-s. (5) he is then triable upon indictment, and it is presumed is liable to the punishments provided in s. 6.

By the Ballot Act (35 & 36 Vict. c. 33, s. 25), and the Municipal Corporations Act (45 & 46 Vict. c. 50), Part IV., certain disqualifications and penalties are affixed to candidates and voters guilty of corrupt practices, which by the interpretation clause means bribery, treating, undue influence, or personation, as described in the Corrupt Practices Act, 1883; and by s. 78 of the Municipal Corporations Act, 1882, a person guilty of a corrupt practice at a municipal election shall be liable to the like actions, prosecutions, penalties, forfeitures, and punishments as if the corrupt practice had been committed at a parliamentary election. The expenses of the prosecution are provided for in the case of municipal elections by s. 84 of the Municipal Corporations Act. In the Ballot Act there appears to be no provision for the expenses of prosecutions for corrupt practices other than personation (see *post*, "False Personation"); but the expenses of *prosecutions for corrupt practices under the 17 & 18 Vict. c. 102, are provided for by sect. 10 of that Act.

Bribery at elections for members of parliament is also an offence at common law, punishable by indictment or information, and it was held that the statute 2 Geo. 2, c. 24, which imposes a penalty upon such offence did not affect that mode of proceeding. *R. v. Pitt*, 3 Burr. 1339; 1 W. Bl. 380. The following cases were decided before the recent statutes. Where money is given it is bribery, although the party giving it take a note from the voter, giving a counter note, to deliver up the first note when the elector has voted. *Sulston v. Norton*, 3 Burr. 1235; 1 W. Bl. 317. So also a wager with a voter, that he will not vote for a particular person. *Lofft*, 552; *Hawk. P. C. b. 1*, c. 67, s. 10 (n).

Where a voter received money after an election for having voted for a particular candidate, but no agreement for any such payment was made before the election, it was held not to be an offence within the 2 Geo. 2, c. 24, s. 7 (repealed). *Lord Huntingtower v. Gardiner*, 1 B. & C. 297, 8 E. C. L.

As to the payment of the travelling expenses of voters, see 1 Russ. Cri. 321, 5th ed.; the cases there cited; *Cooper v. Slade*, 25 L. J., Q. B. 324; and 46 & 47 Vict. c. 51, ss. 13—23, 48.

By the 31 & 32 Vict. c. 125, s. 17, on the trial of an election petition, unless the judge otherwise directs, evidence of corrupt practices may be given before proof of agency.

Bribery in other cases. . As to the offence of attempting to bribe officers of justice, see 1 Russ. Cr. 309, 5th ed.¹ See also tit. "Offices," *post*. See also tit. "Elections," *post*.

26 & 27 Vict. c. 29, s. 6, enacts: "In any indictment or information for bribery or undue influence, and in any action or proceeding for any penalty for bribery, treating, or undue influence, it shall be sufficient to allege that the defendant was, at the election at or in connection with which the offence is intended to be alleged to have been committed, guilty of bribery, treating, or undue influence, as the case may require; and in any criminal or civil proceedings in relation to any such offence, the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election or of any person therein named having been a candidate thereat.

See *Reed v. Lamb*, 6 H. & N. 75, a case decided before the passing of this Act; *R. v. Varle*, 6 Cox, C. C. 470, a case of an indictment for personating a voter at an election; and *R. v. Clarke*, 1 F. & F. 654.

¹ An indictment for attempting to bribe a juror is sustained by proof of an offer of services made to the juror. A writing containing the offer is admissible in evidence. *Caruthers v. State*, 74 Ala. 406. Where the grand jury has been improperly influenced, upon evidence thereof the indictment will be set aside. *People v. Sellick*, 4 N. Y. Crim. Rep. 329. Their affidavits that they were not influenced are inadmissible. *Id*.

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*BRIDGES.

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Indictment for not repairing. Upon an indictment for a nuisance to a public bridge, whether by obstructing or neglecting to repair it, the prosecutor must prove, first, that the bridge in question is a public bridge; and secondly, that it has been obstructed or permitted to be out of repair; and, in the latter case, the liability of the defendants to repair.

Proof of the bridge being a public bridge. A distinction between a public and a private bridge is taken in the 2nd Institute, p. 701, and made to consist principally in a public bridge being built for the common good of all the subjects, as opposed to a bridge made for private purposes, and though the words "public bridges" do not occur in the 22 Hen. 8, c. 5 (called the statute of bridges), yet as that statute empowers the justices of the peace to inquire of "all manner of annoyances of bridges broken *in the highways*," and applies to bridges of that description, in all its subsequent provisions, it may be inferred that a bridge *in a highway* is a public bridge for all purposes of repair connected with that statute. 1 Russ. Cri. 530, 5th ed. A public bridge may be defined to be such a bridge as all His Majesty's subjects have used freely and without interruption, as of right, for a period of time competent to protect themselves, and all who should thereafter use them, from being considered as wrong-doers, in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use may be questioned. *Per* Lord Ellenborough, *R. v. Inhab. of Bucks*, 12 East, 204. With regard to bridges newly erected, the general rule is, that if a man builds a bridge, and it becomes useful to the county in general, it shall be deemed a public bridge (but see the regulations prescribed by the 43 Geo. 3, c. 59, s. 5, *post*, p. 354), and the county shall repair it. But where a man

*350] builds a bridge for his own private benefit, although the public may occasionally participate with him in the use of it yet,

it does not become a public bridge. *R. v. Inhab. of Bucks*, 12 East, 203, 204. Though it is otherwise if the public have constantly used the bridge, and treated it as a public bridge. *R. v. Inhab. of Glamorgan*, 2 East, 356 (n). Where a miller, on deepening a ford through which there was a public highway, built a bridge over it which the public used, it was held that the county was bound to repair. *R. v. Inhab. of Kent*, 2 M. & S. 513. A question has sometimes arisen whether arches adjacent to a bridge, and under which there is passage for water in times of flood, are to be considered either as forming part of the bridge, or as being themselves independent bridges. Where arches of this kind existed more than 300 feet from a bridge, on an indictment against the county for non-repair of them, and a case reserved, the Court of King's Bench held that the county was not liable. *R. v. Inhab. of Oxfordshire*, 1 Barn. & Ald. 297 (n). The rule laid down by Lord Tenderden, C. J., in the latter case was, that the inhabitants of a county are bound, by common law, to repair bridges erected over such water only as answers the description of *flumen vel cursus aquae*, that is, *water flowing in a channel between banks more or less defined*, although such channel may be occasionally dry. But where a structure, called Swarkestone Bridge, was 1,275 yards long; at the eastern end were five arches under which the river Trent flowed; at the western end eight arches, under one of which a stream constantly flowed; the rest of the space consisted of a raised causeway, at different intervals, in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood. There was no interval of causeway between the arches of the length of 300 feet. The county of Derby had immemorially repaired the whole structure. On an indictment against the inhabitants of the county for the non-repair of the structure, describing the whole as a bridge, it was held that it was properly so described, and that the verdict was properly entered for the crown. *R. v. Inhab. of Derbyshire*, 2 Gal. & Dav. 97. Before the 43 Geo. 3, c. 59, a bridge had been built over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged two and a half feet. It was a part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments to prevent it from overflowing the adjoining meadows. Cresswell, J., left it to the jury, whether this structure was a bridge, for if so, their verdict must be for the crown. If it had been erected for the convenience of the public in passing over the stream of water, it was a county bridge, and rendered the county liable to repair it, though the bridge might not have been necessary for the convenience of the public when it was built. *R. v. the Inhab. of Gloucestershire*, Carr. & M. 506, 41 E. C. L. In the following case, a question arose whether a bridge for foot-passengers, which had been built adjoining to an old bridge, for carriages, was parcel of the latter. The carriage-bridge had been built before 1119, and certain abbey lands were charged with the repairs. The proprietors of those lands had always repaired the

bridge so built. In 1765, the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot-bridge along the outside of the parapet of the carriage-bridge, partly connected with it by brickwork and iron *pins, and partly resting on the stonework of the bridge. Held *351] that the foot-bridge was not parcel of the old carriage-bridge, but a distinct structure, and that the county was bound to repair it. *R. v. Inhab. of Middlesex*, 3 B. & Ad. 201, 23 E. C. L.

Where the trustees under a turnpike act built a bridge across a stream where a culvert would be sufficient, yet if the bridge become upon the whole more convenient to the public, the county cannot refuse to repair it. *R. v. Inhab. of Lancashire*, 2 B. & Ad. 813, 22 E. C. L.

Semble, that an arch of nine feet span without battlements at either end, over a stream usually about three feet deep, is a culvert, and not a bridge to be repaired by the county; and if the parish have pleaded guilty to a former indictment, which described it as part of the road, they are concluded by having so done. *R. v. Whitney*, 3 Ad. & E. 69, 30 E. C. L.; 7 C. & P. 208, 32 E. C. L.

But a foot-bridge consisting of three oak planks, about nine or ten feet long, and carrying a public footpath over a small stream, is not such a bridge as the county is bound to repair as a county bridge. *R. v. Inhab. of Southampton*, 21 L. J., M. C. 201.

The public may enjoy a limited right only of passing over a bridge; as where a bridge was used at all times by the public, on foot, and with horses, but only occasionally with carriages, viz., when the ford below was unsafe to pass, and the bridge was sometimes barred against carriages by means of posts and a chain; it was held that this was a public bridge, with a right of passage limited in extent, yet absolute in right. *R. v. Inhab. of Northampton*, 2 M. & S. 262. A bar across a public bridge locked, except in time of flood, has been ruled to be conclusive evidence that the public have only a limited right to use the bridge at such times, and it is a variance to state that they have a right to use it "at their free will and pleasure." *R. v. Marquis of Buckingham*, 4 Camp. 189. But where a bridge passed over a ford, and was only used by the public in times of floods, which rendered the ford impassable, yet, as it was at all times open to the public, Abbott, C. J., ruled that the county was bound to repair. *R. v. Inhab. of Devon, Ry. & Moo*, N. P. C. 144.

Proof of the bridge being a public bridge—highway at each end. At common law the county is bound *prima facie* to repair the highway at each end of a public bridge, and by the statute 22 Hen. 8, c. 5, the length of the highway to be thus repaired is fixed at thirty feet. If indicted for the non-repair of such portion of the highway, they can only excuse themselves by pleading specially, as in the case of the bridge itself, that some other person is bound to repair by prescription, or by tenure. *R. v. Inhab. of West Riding of York*, 7 East, 588; 5 Taunt. 284. The inhabitants of Devon erected a new

bridge within 300 feet next adjoining to an old bridge in the county of Dorset; which 300 feet the county of Dorset was bound to repair. It was held, nevertheless, that Devon was bound to repair the new bridge, which was a distinct bridge, and not to be considered as an appendage to the old bridge. *R. v. Inhab. of Devon*, 14 East, 477.

A party who is liable by prescription to repair a bridge is also *prima facie* liable to repair the highway to the extent of 300 feet from each end; and such presumption is not rebutted by proof that the party has been known only to repair the fabric of the bridge, and that the only repairs known to have been done to the highway have been performed by commissioners under a turnpike-road Act. *R. v. City of Lincoln*, 8 A. & E. 65, 35 E. C. L., 3 N. & P. [*352 273.

Now by the 5 & 6 Will. 4, c. 50, s. 21, "if any bridge shall hereafter be built (*i. e.* after the 20th of March, 1836) which bridge shall be liable by law to be repaired by and at the expense of any county, or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike-road, who were by law before the erection of the said bridge bound to repair the said highway: provided, nevertheless, that nothing herein contained shall extend, or be construed to extend, to exonerate or discharge any county, or any part of any county, from repairing or keeping in repair the walls, banks or fences of the raised causeway and raised approaches to any such bridge, or the land arches thereof."

Dedication of a bridge to the public. As there may be a dedication of a road to the public (see *post*, "Highways"), so in the case of a bridge, though it be built by a private individual, in the first instance, for his convenience, yet it may be dedicated by him to the public, by his suffering them to have the use of it, and by their using it accordingly. See *Glasburne Bridge Case*, 5 Burr. 2594; *R. v. Inhab. of Glamorgan*, 2 East, 356; *R. v. Inhab. of West Riding of York*, 2 East, 342; *post*, p. 354. And though, where there is such a dedication, it must be absolute, yet it may be definite in point of time. See *R. v. Inhab. of Northampton*, 2 M. & S. 262; and the other cases cited, *ante*, p. 351; also 1 Russ. Cri. 533, 5th ed. A canal company may dedicate a bridge to the public; *Grand Surrey Canal v. Hall*, 1 M. & Gr. 393, 39 E. C. L.: where it was held that there was nothing in the constitution of the company, or in the nature of their property, to prevent them from making such a dedication.

Proof of the bridge being out of repair. The county is only chargeable with *repairs*, and cannot be indicted for not widening or enlarging a public bridge, which has become from its narrowness inconvenient to the public. Not being bound to make a new bridge, the county is not bound to enlarge an old one, which is, *pro tanto*, the

erection of a new bridge. *R. v. Inhab. of Devon*, 4 B. & C. 670, 10 E. C. L.

Those who are bound to repair bridges must make them of such height and strength, as may be answerable to the course of the water, whether it continue in the old channel or make a new one. *Hawk. P. C. b. 1, c. 77, s. 1.*

Proof of the liability of the defendants—by the common law. All public bridges are *prima facie* repairable, at common law, by the inhabitants of the county, and it lies upon them, if the fact be so, to show that others are bound to repair. *R. v. Inhab. of Salop*, 13 East, 95; 2 Inst. 700, 701; *R. v. Inhab. of Oxfordshire*, 4 B. & C. 194, 10 E. C. L.

Where a bridge was locally situated within the limits of a borough, which was enlarged by 2 & 3 Will. 4, c. 64, but before the passing of that Act was situated without the limits of the borough, and in a county which had up to that time always repaired it; it was held that the county was still liable to repair it. *R. v. New Sarum*, 7 Q. B. 241, 53 E. C. L.; 15 L. J., M. C. 15; see *R. v. Brecon*, 15 Q. B. 813, 69 E. C. L.; 19 L. J., *353] *M. C. 203. The maintenances of borough bridges is now provided for by 45 & 46 Vict. c. 50, s. 119.

But a parish or township, or other known portion of a county, may, by usage and custom, be chargeable to the repair of a bridge erected in it. *Per cur. R. v. Ecclesfield*, 1 B. & A. 348. So where it is within a franchise. *Hawk. P. C. b. 1, c. 77, s. 1.* The charge may be cast upon a corporation aggregate, either in respect of the tenure of certain lands, or of a special prescription, and, in the same manner, it may be cast upon an individual, *ratione tenuræ*. *Id.* Where an individual is so liable, his tenant for years in possession is under the same obligation. *R. v. Bucknell*, 2 Ld. Raym. 792. Any particular inhabitant of a county, or any of several tenants of lands charged with such repairs, may be indicted singly for not repairing, and shall have contribution from the others. *Hawk. P. C. b. 1, c. 77, s. 3; 2 Ld. Raym. 792.* The inhabitants of a district cannot be charged *ratione tenuræ*, because they cannot, as such, hold lands. *R. v. Machynlleth*, 2 B. & C. 166, 9 E. C. L. But a parish, as a district, may at common law be liable to repair a bridge, and may therefore be indicted for the not repairing, without stating any other ground of liability than immemorial usage. *R. v. Inhab. of Hendon*, 4 B. & Ad. 628, 24 E. C. L. An indictment charged that there was in township A. an immemorial public bridge, and that the inhabitants of A. had been used, etc., from time whereof, etc., to repair the said bridge. Plea, not guilty. On the trial it appeared that the inhabitants had repaired an immemorial bridge, but that in one year within memory they had widened the roadway of the bridge from nine to sixteen feet: it was held, that whether the added part were repairable by the township or not, there was no variance between the indictment and the evidence. *Semble, per Lord Denman, C. J., and Patteson, J., that the township was liable to repair the added part. R. v. The Inhab. of Adderbury*, 5

Q. B. 187, 48 E. C. L. Where the inhabitants of a half-hundred had always repaired a bridge out of the hundred rate; it was held that the 5 & 6 Will. 4, c. 50, ss. 5, 21, did not cast the repair upon the parish, as such a bridge was included in the words "county bridges," which are excepted in that Act. *R. v. Inhab. of Chart*, L. R., 1 C. C. R. 237; 309 L. J., M. C. 107.

The liability of the county to the repairs of a bridge is not affected by an Act of parliament imposing tolls, and directing the trustees to lay them out in repairing the bridge. This point arose, but was not directly decided, in the case of *R. v. Inhab. of Oxfordshire*, 4 B. & C. 194, 10 E. C. L., the plea in that case not averring that the trustees had funds; but Bayley, J., observed, that even then a valid defence would not have been made out, for the public had a right to call upon the inhabitants of the county to repair, and *they* might look to the trustees under the Act. With regard to highways, it has been decided that tolls are in such cases only an auxiliary fund, and that the parish is primarily liable. (See *post*, "Highways.") And as the liability of a county resembles that of a parish, these decisions may be considered as authorities with regard to the former.

Proof of the liability of the defendants—by the common law—new bridges. Although a private individual cannot by erecting a bridge, the use of which is not beneficial to the public, throw upon the county the *onus* of repairing it, yet if it become useful to the county in general, the county is bound to repair it. *Glasburne Bridge Case*, 5 Burr. 2594; *R. v. Ely*, 15 Q. B. 827, 69 E. C. L.; 19 L. J., M. C. 223. *Thus, where to an indictment for not repairing a public bridge, the defendants pleaded that H. M. being seized [*354 of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, erected the bridge, and that he and his tenants enjoyed a way over the bridge for their private benefit and advantage, and that, therefore, he ought to repair; and on the trial the statements in the plea were proved, but it also appeared that the public had constantly used the bridge from the time of its being built; Lord Kenyon directed the jury to find a verdict for the crown, which was not disturbed. *R. v. Inhab. of Glamorgan*, 2 East, 356 (n.)

Where a new bridge is built, the acquiescence of the public will be evidence that it is of public utility. As to charge the county, the bridge must be made on a highway, and as, while the bridge is making, there must be an obstruction of the highway, the forbearing to prosecute the parties for such obstruction is an acquiescence by the county in the building of the bridge. See *R. v. Inhab. of St. Benedict*, 4 B. & Ald. 447, 6 E. C. L. The evidence of user of a bridge by the public differs from the evidence of user of a highway, for as a bridge is built on the highway, and the public using the latter must necessarily use the former, and the proof of adoption can hardly be said to arise, but the user is evidence of acquiescence, as showing that the public have not found or treated the bridge as a nuisance. See *R. v. Inhab. of West Riding of York*, 2 East, 342. Where a bridge

is erected under the authority of an Act of parliament, it cannot be supposed to be erected for other purposes than the public utility. *Per* Lawrence, J., Id. 352. If a bridge be built in a slight or incommodious manner, it cannot be imposed as a burthen on the county, but may be treated altogether as a nuisance, and indicted as such. *Per* Lord Ellenborough, Id.

And by the 43 Geo. 3, c. 59, s. 5, no bridge to be thereafter erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction, or to the satisfaction, of the county surveyor, or person appointed by the justices of the peace, at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions.

The words of this Act comprehend every kind of person by whom, or at whose expense, a bridge shall be built. Trustees appointed under a local turnpike Act are "individuals" or "private persons" within the statute, and therefore a bridge erected by such trustees after the passing of the Act, and not under the direction of the county surveyor, is not a bridge which the county is bound to repair. *R. v. Inhab. of Derby*, 3 B. & Ad. 147, 23 E. C. L. A bridge built before the above statute, when widened since, is not a new bridge within the Act. *R. v. Lancashire*, 2 B. & Ad. 813, 22 E. C. L. So where the woodwork of a bridge was washed away, leaving the stone abutments, and the parish repaired the bridge, partly with the old wood and partly with new, this was held not to be a bridge "erected or built" within the above statute, but an old bridge repaired, and the county was held liable. *R. v. Inhab. of Devon*, 5 B. & Ad. 383, 27 E. C. L.; 2 N. & M. 212.

Proof of the liability of the defendants—public companies. In some *355] cases where public companies have been authorized by the legislature to erect or alter bridges, a condition has been implied that they shall keep such bridges in repair. The proprietors of the navigation of the river Medway were by their Act empowered to alter or amend such bridges and highways as might hinder the navigation; *leaving them, or others as convenient, in their room*. Having deepened a ford in the Medway, the company built a bridge in its place, which, being washed away, they were held bound to rebuild. Lord Ellenborough said that the condition to repair was a continuing condition, and that the company, having taken away the ford, were bound to give another passage over the bridge, and to keep it in repair. *R. v. Inhab. of Kent*, 13 East, 220. The same point was ruled in another case in which the company had made a cut through a highway, and built a bridge over it. *The King v. The Inhab. of Lindsay*, 14 East, 317. An Act of parliament empowered the commissioners for making navigable the river Waveney, to cut, etc., but was silent as to making

bridges. The commissioners having cut through a highway, and rendered it impassable, a bridge was built over the cut, along which the public passed, and the bridge was repaired by the proprietors. The bridge being out of repair, the proprietor of the navigation was held liable for the repairs. The court said that the cut was made, not for public purposes, but for private benefit; and the county could not be called upon to repair, for it was of no advantage to them to have a bridge instead of solid ground. *R. v. Kerrison*, 3 M. & S. 326. See also *R. v. Inhab. of Somerset*, 16 East, 305; *Grand Surrey Canal v. Hall*, 1 M. & Gr. 392, 39 E. C. L.; *R. v. Ely*, 15 Q. B. 827, 69 E. C. L.; 19 L. J., M. C. 223; *R. v. Brecon*, 15 Q. B. 813, 69 E. C. L.; 19 L. J., M. C. 203.

A corporation aggregate, or a railway company, are liable to be indicted in their corporate capacity for the non-repair of bridges, which it is their duty to repair. *Per Parke, B., R. v. Birmingham & Gloucester R. R. Co.*, 9 C. & P. 469, 38 E. C. L.; 3 Q. B. 223, 43 E. C. L.

Proof of the liability of the defendants—individuals. *Ratione tenuræ* implies immemoriality. 2 Saund. 158 d. (n). And therefore, upon an indictment against an individual for not repairing, by reason of the tenure of a mill, if it appear that the mill was built within the time of legal memory, he must be acquitted. *R. v. Hayman*, Moo. & M. 401. Any act of repairing on the part of an individual is, *prima facie*, evidence of his liability. Thus, it is said, that if a bishop has once or twice, of alms, repaired a bridge, this binds not, yet it is evidence against him that he ought to repair, unless he proves the contrary. 2 Inst. 700.

It was for some time undecided whether reputation was evidence on an indictment against an individual for not repairing a bridge, *ratione tenuræ*. *R. v. Wavertree*, 2 M. & R. 253; *R. v. Antrobus*, 6 C. & P. 790, 25 E. C. L.; *R. v. Sutton*, 3 N. & P. 569; 8 A. & E. 516, 35 E. C. L.; but in the case of *R. v. Bedford*, 24 L. J., Q. B. 81, the court decided, that on the trial of an indictment against the county of B., to which they pleaded that A. was liable, *ratione tenuræ*, to repair a portion of the bridge, evidence of reputation that A. and his predecessors were liable to do the repairs to that part was admissible. See *Baker v. Greenhill*, 3 Q. B. 148, 43 E. C. L.; *R. v. Sir J. Ramsden*, 27 L. J., M. C. 296, as to whether the liability to repair *ratione tenuræ* falls upon the owner or occupier.

***Proof in defence—by counties.** Where a county is indicted, and the defence is that a parish or other district, or a [*356 corporation, or individual, is liable to the repairs, this defence must be specially pleaded, and cannot be given in evidence under the general issue of *not guilty*. *R. v. Inhab. of Wilts*, 1 Stark. 359; 2 Lord Raym. 1174; 1 Russ. Cri. 498, 553, 5th ed.; 2 Stark. Ev. 191, 2nd ed. Upon that plea the defendants can only give evidence in denial of the points which must be established on the part of the prosecution,

viz. 1, that the bridge is a public one; 2, that it is within the county; and, 3, that it is out of repair. 2 Stark. Ev. 191, 2nd ed. With a view to the first point, the inhabitants of a county may show under *not guilty* that a district or individual is bound to repair, as a medium of proof that the bridge is not a public bridge. *Id.*; *R. v. Inhab. of Northampton*, 2 M. & S. 262. For repairs done by an individual are to be ascribed rather to motives of interest in his own property than to be presumed to be done for the public benefit. *Per* Lord Ellenborough, *Id.*

Upon a special plea by a county, that some smaller district or some individual is liable to repair, the evidence on the part of the county to prove the obligation, seems to be the same as upon an indictment against the smaller district or individual. 2 Stark Ev. 192, 2nd ed.

It was held that the 5 & 6 Will. 4, c. 76, now repealed by 45 & 46 Vict. c. 50, enlarging the boundaries of certain cities and boroughs in England and Wales for the purposes therein mentioned, did not relieve a county from the repair of a bridge situated within the new limit of a borough, but which, previous to the Act, was without the old limit, and repairable by the county at large. *R. v. Inhab. of New Sarum*, *ante*, p. 352.

Proof in defence—by minor districts, or individuals. Where a parish, or other district, or a corporation, or individual, not chargeable of common right with the repairs of a bridge, is indicted, they may discharge themselves under the general issue. *R. v. Inhab. of Norwich*, 1 Str. 177. For as it lies on the prosecutor specially to state the grounds on which such parties are liable, they may negative those parts of the charge under the general issue. 1 Russ. Cri. 498, 553, 5th ed.; *sed vide* *R. v. Hendon*, 4 B. & Ad. 628, 24 E. C. L., *ante*, p. 353.

Proof in defence—by corporations. A corporation may be bound by prescription to repair a bridge, though one of their charters within time of legal memory use words of incorporation, and though the bridge may have been repaired out of the funds of a guild: for such repairs will be taken to have been made in ease of the corporation. *R. v. Mayor, etc., of Stratford-upon-Avon*, 14 East, 348.

Venue and trial. By the 1 Ann. st. 1, c. 18, s. 5, "all matters concerning the repairing and amending of the bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere." It seems that no inhabitant of a county ought to be a juror on a trial of an issue whether the county is bound to repair. Hawk. P. C. b. 1, c. 77, s. 6. In such cases, upon a suggestion, the *venue* will be awarded into a *neighboring county. *R. v. Inhab. of Wilts*, 6 Mod. 307; 1 *357] Russ. Cri. 555, 5th ed.

Maliciously pulling down bridges, etc. By the 24 & 25 Vict. c. 97, s. 33 (replacing the 7 & 8 Geo. 4, c. 30, s. 13, and the 9 Geo. 4, c. 56 (I.), s. 14), "whosoever shall unlawfully and maliciously pull or throw down, or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct, any highway, railway, or canal shall pass, or do any injury with intent, and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

In the former statute *public* bridges alone were mentioned, and the marginal abstract of the section in the new Act speaks of *public* bridges only. It may be doubtful whether the omission of the word "public" is not a typographical error.

As to "Malice," and possession of the property, see ss. 58 and 59 (*supra*, p. 289).

New trial. As to when a new trial may be obtained in prosecutions for the non-repair of a bridge, see tit. "Highways," *infra*.

*358]

*BURGLARY.

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Offence at common law. Burglary is a felony at common law, and a burglar is defined by Lord Coke as "he that in the night-time breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within

the same, whether his felonious intent be executed or not." 3 Inst. 63. And this definition is adopted by Lord Hale.¹ 1 Hale, P. C. 549; Hawk. P. C. b. 1, c. 38, s. 1.

By statute. The former statute on this subject (the 7 & 8 Geo. 4, c. 29) is repealed. The provisions against this offence are contained in the 24 & 25 Vict. c. 96.

Burglary by breaking out. By s. 51, "whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary."

Punishment of burglary. By s. 52, "whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

What building within the curtilage shall be deemed part of the dwelling-house. By s. 53, "no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other."

Entering a dwelling-house in the night with intent to commit felony. By s. 54, "whosoever shall enter any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Being found by night armed, etc., with intent to break into any house, etc. By s. 58, "whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building *whatsoever, and to commit any felony therein, or shall be [*360 found by night having in his possession without lawful excuse (the proof of which shall lie on such person) any picklock key, crow-

¹ A proprietor and clerk of a store, being apprised of an intended burglary therein, took no steps to prevent it, but provided a force to capture them and did so; held that the owner's knowledge did not affect the question of the defendant's guilt. *Thompson v. State*, 18 Ind. 386. S.

jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened, or otherwise disguised, with intent to commit any felony, or shall be found by night in any dwelling-house, or other building whatsoever, with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor.”

By s. 59, “whosoever shall be convicted of any such misdemeanor, as in the last preceding section mentioned, committed after a previous conviction either for felony or such misdemeanor, shall, on such subsequent conviction, be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three [now five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labor.”

For the definition of night, see 24 & 25 Vict. c. 96, s. 1, *post*, p. 382.

Proof of the breaking. What shall constitute a *breaking* is thus described by Hawkins: “It seems agreed, that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it be opened or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice et burglariter*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, that if one enter into a house by a door which he finds open, or through a hole which was made there before, and steals goods, etc., or draw anything out of a house through a door or window which was open before, or enter into the house through a door open in the daytime, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary.”¹ Hawk. P. C. b. 1, c. 38, ss. 4, 5. But breaking a window, taking a pane of glass out by breaking or bending the nails or other fastenings, the drawing of a latch, when a door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or the fastening of a window, with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided; these are all proofs of a breaking.² 2 East, P. C. 487; 2 Russ. Cri. 3, 5th ed.

By the 24 & 25 Vict. c. 96, s. 54, *supra*, entering a dwelling-house in the night with intent to commit a felony is made a substantive

¹ On the trial of an indictment for breaking and entering a building and stealing therefrom, a number of burglarious tools and implements found together in the possession of the defendant, at the time of his arrest, may be brought into court, and exhibited to the jury, although some of them only, and not the residue, are adapted to the commission of the particular offence in question. *Commonwealth v. Williams*, 2 Cush. 582. S.

² So, removing a stick of wood from an inner cellar-door, and turning a button. *Smith's Case*, 4 Rog. Rec. 63. S.

felony. In this case no breaking is necessary, and the offence is not, therefore, strictly speaking, burglary; but from its being in all other respects similar to that offence, it is classed under that head. A count framed on this section will frequently be useful where the breaking is doubtful.

• **Proof of the breaking—doors.** Entering the house through an open door is not, as already stated, such a breaking as to constitute a burglary. Yet if the offender enters a house in the night-time, through an open door or window, and when within the house turns *the key of, or unlatches a chamber door with intent to commit felony, it is a burglary.¹ Hale, P. C. 553. So where the [*361 prisoner entered the house by a back-door which had been left open by the family, and afterwards broke open an inner door and stole goods out of the room, and then unbolted the street door on the inside and went out; this was held by the judges to be burglary. *R. v. Johnson*, 2 East, P. C. 488. So where the master lay in one part of the house, and the servants in another, and the stair-foot door of the master's chamber was latched, and a servant in the night unlatched that door, and went into his master's chamber with intent to murder him, it was held burglary. *R. v. Haydon*, Hutt. 20; Kel. 67; 1 Hale, P. C. 554; 2 East, P. C. 488.

Whether the pushing open the flap or flaps of a trap-door, or door in a floor, which closes by its own weight, is a sufficient breaking, was for some time a matter of doubt. In the following case it was held to be a breaking. Through a mill (within a curtilage) was an open entrance or gateway, capable of admitting wagons, intended for the purpose of loading them with flour through a large aperture communicating with the floor above. This aperture was closed by folding doors with hinges, which fell over it, and remained closed with their own weight, but without any interior fastenings, so that persons without, under the gateway, could push them open at pleasure. In this manner the prisoner entered with intent to steal; and Buller, J., held that this was a sufficient breaking to constitute the offence of burglary. *R. v. Brown*, 2 East, P. C. 487. In another case, upon nearly similar facts, the judges were equally divided in opinion. The prisoner broke out of a cellar by lifting up a heavy flap, whereby the cellar was closed on the outside next the street. The flap had bolts, but was not bolted. The prisoner being convicted of burglary, upon a case reserved, six of the judges, including Lord Ellenborough, C. J., and Mansfield, C. J., thought that this was a sufficient breaking; because the weight was intended as a security, this not being a common entrance; but the other six judges thought the conviction wrong. *R. v. Callan*, Russ. & Ry. 157. It has been observed, that the only difference between this and *R. v. Brown* (*supra*) seems to be, that in the latter there were no internal fastenings, which in Callan's case

¹ *State v. Wilson*, 1 Cox, 439. The pushing open a closed door is a sufficient breaking within the meaning of the law to constitute burglary. *State v. Reed*, 20 La. 413. S.

there were, but were not used. *Russ. & Ry.* 158 (*n.*). The authority of *R. v. Brown* has been since followed, and that decision may now be considered to be law.

Upon an indictment for burglary, the question was, whether there had been a sufficient breaking. There was a cellar under the house, which communicated with the other parts of it by an inner staircase: the entrance to the cellar from the outside was by means of a flap which let down: the flap was made of two-inch stuff, but reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising the flap-door. It had been from time to time fastened with nails, when the cellar was not wanted. The jury found that it was not nailed down on the night in question. The prisoner being convicted, on a case reserved, the judges were of opinion that the conviction was right. *R. v. Russell*, 1 *Moody, C. C.* 377.

Unless a distinction can be drawn between breaking into a house and breaking out of it, this case seems to overrule. *R. v. Lawrence*, 4 *C. & P.* 231, 19 *E. C. L.*

*362] ***Proof of the breaking—windows.** Where a window is open, and the offender enters the house, this is no breaking, as already stated, *ante*, p. 360. And where the prisoner was indicted for *breaking* and entering a dwelling-house and stealing therein, and it appeared that he had effected an entrance by pushing up or raising the lower sash of the parlor window, which was proved to have been, about twelve o'clock on the same day, in an open state, or raised about a couple of inches, so as not to afford room for a person to enter the house through that opening, it was said by all the judges that there was no decision under which this could be held to be a *breaking*.¹ *R. v. Smith*, 1 *Moody, C. C.* 178. A square of glass in the kitchen window (through which the prisoners entered) had been previously broken by accident, and half of it was out when the offence was committed: The aperture formed by the half-square was sufficient to admit a hand, but not to enable a person to put in his arm, so as to undo the fastening of the casement: One of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement; the window being thus opened, the two prisoners entered the house. The doubt which the learned judges (*Alderson, J.*, consulting *Patteson, J.*) entertained, arose from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing (it not being like

¹ In burglary, the mere raising of a partly opened sash so as to admit a person is not a breaking. *Commonwealth v. Strupney*, 105 *Mass.* 533. The raising of a window sash which was down and which was the only obstacle to ingress, through the window, and the entry of the accused through the same is a sufficient breaking in law to constitute burglary. *Frank v. State*, 39 *Mass.* 705. Removal of an iron grating covering an area, opposite a cellar window is a breaking. *People v. Nolan*, 22 *Mich.* 229. The windows of a dwelling-house being covered with a netting of double twine nailed to the sides, top, and bottom, it was held, that cutting and tearing down the netting and entering the house through the window were a sufficient entry and breaking to constitute burglary. *Commonwealth v. Stephenson*, 8 *Pick.* 354. *S.*

a chimney, an aperture necessarily left in the original construction of the house, see *post*, p. 363), from enlarging an aperture by lifting up further the sash of the window, as in *R. v. Smith, supra*; but the learned judges thought it was worth considering whether in both cases the facts did not constitute, in point of law, a sufficient breaking. Upon a case reserved, all the judges who met were of opinion that there was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window. *R. v. Robinson*, 1 Moody, C. C. 327. See *R. v. Bird*, 9 C. & P. 44, 38 E. C. L.

Where a house was entered through a window upon hinges, which was fastened by two nails which acted as wedges, but notwithstanding these nails the window would open by pushing, and the prisoner pushed it open, the judges held that the forcing the window in this manner was a sufficient breaking to constitute burglary. *R. v. Hall*, Russ. & Ry. 355. So pulling down the upper sash of a window which has no fastening, but which is kept in its place by the pulley-weight only, is a breaking, although there is an outer shutter which is not fastened. *R. v. Haines*, Russ. & Ry. 451. So raising a window which is shut down close, but not fastened, though it has a hasp which might be fastened: *Per Park and Coleridge, JJ., R. v. Hyam*, 7 C. & P. 441, 32 E. C. L.

Where a cellar window, which was boarded up, had in it an aperture of considerable size to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and by the assistance of the others thus entered the house, *Vaughan, B.*, ruled that this resembled the case of a man having a hole in the wall of his house large enough for a man to enter, and that it was not burglary. *R. v. Lewis*, 2 C. & P. 628, 12 E. C. L. A shutter-box partly projected from a house, and adjoined the side of the shop window, which side was protected by wooden panelling lined with iron; held that the breaking and entering of the shutter-box without getting into the house did not constitute burglary. *R. v. Paine*, 7 C. & P. 135, 32 E. C. L.

***Proof of the breaking—chimneys.** It was at one time considered doubtful whether getting into the chimney of a [*363 house in the night-time, with intent to commit a felony, was a sufficient breaking to constitute burglary. 1 Hale, P. C. 552. But it is now settled that this is a breaking: for though actually open, it is as much inclosed as the nature of the place will allow. *Hawk. P. C. b. 1, c. 38, s. 6*; 2 East, P. C. 485. And accordingly it was so held, in a late case, by ten of the judges (contrary to the opinion of *Holroyd, J.*, and *Burrough, J.*). Their lordships were of opinion that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the prisoner, by lowering himself, in the chimney, made an entry into the dwelling-house.¹ *R. v. Brice*, Russ. & Ry. 450.

¹ Getting into the chimney of a house with intent to steal is a sufficient breaking to constitute burglary, though the party does not enter any of the rooms in the house. *Donohoo v. State*, 36 Ala. 231. See *Robertson's Case*, 4 Rog. Rec. 63. S.

But an entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and requires protection, whereas, if a man chooses to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *R. v. Spriggs*, 1 Moo. & R. 357.

Proof of the breaking—fixtures, cupboards, etc. The breaking open of a movable chest or box in a dwelling-house, in the night-time, is not such a breaking as will make the offence burglary, for the chest or box is no part of the mansion-house.¹ *Foster*, 108; 2 *East*, P. C. 488. Whether breaking open the door of a cupboard let into the wall of a house, be burglary or not, does not appear ever to have been solemnly decided. In 1690, a case in which the point arose was reserved for the opinion of the judges, and they were equally divided upon it. *Foster*, 108. Lord Hale says that such a breaking will not make a burglary at common law. 1 *Hale*, P. C. 527. Though on the authority of *R. v. Simpson*, Kel. 31; 2 *Hale*, P. C. 358, he considers it a sufficient breaking within the repealed stat. 39 Eliz. c. 15. In the opinion of Mr. Justice Foster, however, *R. v. Simpson* does not warrant the latter position. *Foster*, 108; 2 *East*, P. C. 489. And see 2 *Hale*, P. C. 358 (n). Mr. Justice Foster, concludes that such fixtures as merely supply the place of chests and other ordinary utensils of households, should for the purpose be considered in no other light than as mere movables. *Foster*, 109; 2 *East*, P. C. 489.

Proof of the breaking—walls. Whether breaking a wall, part of the curtilage, is a sufficient breaking to constitute burglary, has not been decided. Lord Hale, after citing 22 Assiz. 95, which defines burglary to be “to break houses, churches, walls, courts, or gates, in time of peace,” says—“by that book it should seem that if a man—hath a wall about his house for its safeguard, and a thief in the night breaks the wall or the gate thereof, and finding the doors of the gate open enters in the house, this is burglary; but otherwise it had been, if he had come over the wall of the court and found the door of the house open, then it had been no burglary.” 1 *Hale*, P. C. 559. Upon this passage an annotator of the Pleas of the Crown observes, “This was anciently understood only of the walls or gates of the city (vide Spelman, *in verbo Burglaria*). If so, it will not support our author’s conclusion, wherein he applies it to the wall of a private house.” *Id.* (n.) ed. 1778. It has been likewise observed upon this passage, that the distinction between breaking and coming over the wall or gate, for the purpose of burglary, is very refined, for if
 *364] *it be part of the mansion, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or overleaped, and more properly to fall under the same consideration as the case of a chimney; and if it be not part of the mansion-house for this purpose, then whether it be broken or not is

¹ *The State v. Wilson*, 1 Cox, 439. S.

equally immaterial; in neither case will it amount to burglary. 2 East, P. C. 488.

Proof of the breaking—gates. Where a gate forms part of the outer fence of a dwelling-house only, and does not open into the house, or into some building parcel of the house, the breaking of it will not constitute burglary. Thus, where large gates open into a yard in which was situated the dwelling-house and warehouse of the prosecutors, the warehouse extending over the gateway, so that when the gates were shut the premises were completely inclosed, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. *R. v. Bennett*, Russ. & Ry. 289. So where the prisoner opened the area gate of a house in London, with a skeleton key and entered the house by a door in the area, which did not appear to have been shut, the judges were all of opinion that breaking the area gate was not a breaking of the dwelling-house, as there was no free passage in time of sleep from the area into the dwelling-house. *R. v. Davis*, Russ. & Ry. 322.

Proof of the breaking—constructive breaking—fraud. In order to constitute such a breaking as will render the party subject to the penalties of burglary, it is not essential that force should be employed. There may be a constructive breaking by fraud, conspiracy, or threats, which will render the person who is party to it equally guilty as if he had been guilty of breaking with force. Where, by means of fraud, an entrance is effected into a dwelling-house in the night-time, with a felonious intent, it is burglary. Thieves came with a pretended hue and cry, and requiring the constable to go with them to search for felons, entered the house, bound the constable and occupier, and robbed the latter. So where thieves entered a house, pretending that the owner had committed treason; in both these cases, though the owner himself opened the door to the thieves, it was held burglary. 1 Hale, P. C. 552, 553. The prisoner knowing the family to be in the country, and meeting the boy who kept the key of the house, desired him to go with her to the house, promising him a pot of ale. The boy accordingly let her in, when she sent him for the ale, robbed the house, and went off. This, being in the night-time, was held by Holt, C. J., Tracy, J., and Bury, B., to be burglary. *R. v. Hawkins*, 2 East, P. C. 485. By the same reasoning getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any color of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein. 2 East, P. C. 485. So where persons designing to rob a house, took lodgings in it, and then fell on the landlord and robbed him. Kel. 52, 53; Hawk. P. C. b. 1, c. 38, s. 9.¹

¹ The charge that defendant "feloniously, fraudulently, and burglariously did break and enter," is not sufficient to charge an entry "by fraud." *Sullivan v. State*, 13 Tex. App. 462.

Proof of the breaking—constructive breaking—conspiracy. A breaking may be effected by conspiring with persons within the house, *365] *by whose means those who are without effect an entrance. Thus, if A., the servant of B., conspire with C. to let him in to rob B., and accordingly A. in the night-time opens the door and lets him in, this, according to Dalton (c. 99), is burglary in C. and larceny in A. But according to Lord Hale, it is burglary in both; for if it be burglary in C. it must necessarily be so in A., since he is present and assisting C. in the committing of the burglary. 1 Hale, P. C. 553. John Cornwall was indicted with another person for burglary, and it appeared that he was a servant in the house, and in the night-time opened the street-door and let in the other prisoner, who robbed the house, after which Cornwall opened the door and let the other out, but did not go out with him. It was doubted on the trial whether this was a burglary in the servant, he not going out with the other; but afterwards, at a meeting of all the judges, they were unanimously of opinion that it was a burglary in both, and Cornwall was executed. *R. v. Cornwall*, 2 Str. 881; 4 Bl. Com. 277; 2 East, P. C. 486. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. *R. v. Johnson*, Carr. & M. 218, 41 E. C. L.

Proof of breaking—constructive breaking—menaces. There may also be a breaking in law, where, in consequence of violence committed or threatened, in order to obtain entrance, the owner, either from apprehension of force, or with a view more effectually to repel it, opens the door, through which the robbers enter. 2 East, P. C. 480. But if the owner only throw the money out of the house to the thieves who assault it, this will not be burglary. *Id.*; Hawk. P. C. b. 1, c. 38, s. 3. Though if the money were taken up in the owner's presence, it would be robbery. But in all other cases, where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part or other of the house, though it need not be accompanied with any violence as to the manner of executing it. 2 East, P. C. 486; Hale, Sum. 80.

Proof of breaking—constructive breaking—by one of several. Where several come to commit a burglary, and some stand to watch in adjacent places, and others enter and rob, in such cases the act of one is, in judgment of law, the act of all, and all are equally guilty of the burglary. 1 Hale, P. C. 439, 534; 3 Inst. 63; 2 East, P. C. 486. So where a room-door was latched, and one person lifted the latch and entered the room, and concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch to assist him to enter, and they screened him from observation by opening an umbrella. It was held that Gaselee, J., and Gurney, B., that

the two were, in law, parties to the breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time it was perpetrated. *R. v. Jordan*, 7 C. & P. 432, 32 E. C. L.

Where the breaking in is one night, and the entering the night after, a person present at the breaking, though not present at the entering, is, in law, guilty of the whole offence. *Id.*

***Proof of the entry.** It is always necessary to prove an *entry*, [*366 otherwise it is no burglary. 1 Hale, P. C. 555. If any part of the body be within the house, hand or foot, this is sufficient. *Foster*, 108 ; 2 East, P. C. 490. Thus where the prisoner cut a hole through the window-shutters of the prosecutor's shop, and putting his hand through the hole, took out watches, etc., but no other entry was proved, this was held to be burglary. *R. v. Gibbon*, *Foster*, 108. So where the prisoner broke a pane of glass in the upper sash of a window (which was fastened in the usual way by a latch), and introduced his hand within, for the purpose of unfastening the latch, but while he was cutting a hole in the shutter with a centre-bit, and before he could unfasten the latch, he was seized, the judges held this to be a sufficient entry to constitute a burglary. *R. v. Bailey*, *Russ. & Ry.* 341. The prosecutor standing near the window of his shop, observed the prisoner with his finger against part of the glass. The glass fell inside by the force of his finger. The prosecutor added, that standing as he did in the street, he saw the fore-part of the prisoner's finger on the shop-side of the glass. The judges ruled this a sufficient entry. *R. v. Davis*, *Russ. & Ry.* 499.

Where the facts do not quite amount to an entry, the prisoner may be found guilty of the attempt to commit burglary. *R. v. Spanner*, 12 Cox, C. C. 155.

The getting in at the top of the chimney, as already stated, *ante*, p. 363, has been held to be a *breaking*, and the prisoner's lowering himself down the chimney, though he never enters the room, has been held to be an entry. *R. v. Brice*, *Russ. & Ry.* 450.

Proof of entry—introduction of fire-arms or instruments. Where no part of the offender's body enters the house, but he introduces an instrument, whether that introduction will be such an entry as to constitute a burglary, depends, as it seems, upon the object with which the instrument is employed. Thus if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony, it will amount to an entry, as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand be not in, this is an entry. 1 Hale, P. C. 555 ; *Hawk. P. C. b. 1, c. 38, s. 11* ; 2 East, P. C. 490.

But where the instrument is used, not for the purpose of committing the contemplated felony, but only for the purpose of effecting the entry, the introduction of the instrument will not be such an

entry as to constitute burglary. Thus where thieves had bored a hole *through* the door with a *centre-bit*, and part of the chips were found inside the house, by which it was apparent that the end of the *centre-bit* had penetrated into the house; yet as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, the entry was ruled to be incomplete. *R. v. Hughes*, 2 East, P. C. 491; 1 Leach, 406; Hawk. P. C. b. 1, c. 38, s. 12. A glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the latter were about an inch thick. It appeared that after the sash had been thrown up, a crowbar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found there. On a *367] *case reserved*, the judges were of opinion that this was not burglary, there being no proof that any part of the prisoner's hand was within the window. *R. v. Rust*, 1 Moody, C. C. 183.

Proof of entry—by firing a gun into the house. It has been already stated, that if a man breaks a house and puts a pistol in at the window with intent to kill, this amounts to burglary. 1 Hale, P. C. 555, *ante*, p. 366. "But," says Lord Hale, "if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary—*quære*." Hawkins, however, states, that the discharging a loaded gun into a house is such an entry as will constitute burglary; Hawk. P. C. b. 1, c. 38, s. 11; and this opinion has been followed by Mr. East and Mr. Serjeant Russell. "It seems difficult," says the former, "to make a distinction between this kind of implied entry, and that by means of an instrument introduced between the window or threshold for the purpose of committing a felony, unless it be that the one instrument by which the entry is effected is held in the hand, and the other is discharged from it. No such distinction, however, is anywhere laid down in terms, nothing further appearing than that the entry must be for the purpose of committing a felony." 2 East, P. C. 490; 2 Russ. Cri. 11, 5th ed. It was ruled by Lord Ellenborough, that a man who from the outside of a field discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it. *Pickering v. Rudd*, 4 Camp. 220; 1 Stark, 58.

Proof of entry—constructive entry—by one of several. It is not necessary in all cases to show an actual entry by all the prisoners; there may be a constructive *entry* as well as a constructive *breaking*. A., B., and C. come in the night by consent to break and enter the house of D. to commit a felony; A. only actually breaks and enters the house; B. stands near the door, but does not actually enter; C. stands at the lane's end, or orchard gate, or field-gate, or the like, to watch that no help come to aid the owner, or to give notice to the others if help comes; this is burglary in all, and all are principals. 1 Hale, P. C. 555. So where a man puts a child of tender years in at

the window of the house, and the child takes goods and delivers them to A., who carries them away, this is burglary in A., though the child that made the entry be not guilty on account of its infancy. *Id.* And so if the wife, in the presence of her husband, by his threats or coercion break and enter a house in the night, this is burglary in the husband, though the wife, the immediate actor, is excused by the coercion of the husband. *Id.* 556; and see *R. v. Jordan*, *ante*, p. 365.

Proof of the premises being a dwelling-house. It must be proved that the premises broken and entered were either a dwelling-house or parcel of a dwelling-house. Every house for the dwelling and habitation of man is taken to be a dwelling-house wherein burglary may be committed.¹ 3 *Inst.* 64-5; 2 *East*, P. C. 491.

A mere tent or booth erected in a market or fair is not a dwelling-house for the purpose of burglary. 1 *Hale*, P. C. 557; 4 *Bl. Com.* 225. But where the building was a permanent one of mud and brick on the down at Weyhill, erected only as a booth for the purpose of a fair for a few days in the year, having wooden doors and windows bolted *inside, it was held that as the prosecutor and his wife slept [*368 there every night of the fair (during one of which it was broken and entered) this was a dwelling-house. *Per Park, J.*, *R. v. Smith*, 1 *Moo. Rob.* 256.

Buildings adjoining the dwelling-house. At common law, in cases where buildings were attached to a dwelling-house, and were more or less connected with it, it was frequently a matter of dispute whether they formed a part of the dwelling-house, so that entering them would be burglary.² The different tests proposed were principally three: (1), whether the building in question was within the same curtilage; (2), whether it was under the same roof; (3) whether it had an internal communication with the principal building.

Now, by the provisions of 24 & 25 *Vict. c.* 96, s. 53, *supra* (re-

¹ *Armour v. State*, 3 *Humphreys*, 379. S.

It must be proved that some one resided in the house. *Fuller v. State*, 48 *Ala.* 278.

² The breaking open, in the night-time, of a store, at the distance of twenty feet from a dwelling-house, but not connected with it, is not burglary. *People v. Parker*, 4 *Johns.* 424. Nor when the only connection is a fence. *State v. Ginns*, 1 *N. & McC.* 583. But it has been held that it may be committed in a house standing near enough to the dwelling-house to be used with it as appurtenant to it, or standing in the same yard, whether the yard be open or inclosed. *State v. Twitty*, 1 *Hayw.* 102; *State v. Wilson*, *Id.* 242. So in a store, where there is a room communicating where a clerk sleeps. *Wood's Case*, 5 *Rog. Rec.* 10. Breaking and entering a store-house not part of a dwelling is not burglary. *Hollister v. Commonwealth*, 60 *Pa. St.* 103. Breaking and entering a shop in the night season with intent to steal is by our law burglary; and the placing of spring guns in such a shop for its defence, would be justified if a burglar should be killed by them. *State v. Moore*, 31 *Conn.* 479. Smoke-house must be part of a dwelling-house. *Palmer v. State*, 7 *Calif.* 82. S. *Fletcher v. State*, 10 *Lee*, (*Tenn.*) 338.

Under the statute in South Carolina an allegation in the indictment that the burglary was committed in a "gin-house situate within the curtilage of the dwelling-house" is insufficient. *State v. Evans*, 18 *S. C.* 137. Ownership is sufficiently averred by the words "mill-house, not adjoining to or occupied with the dwelling-house, of, etc." *Webster v. Commonwealth*, 80 *Va.* 598; *contra*, *State v. Reese*, 7 *W. Va.* 375.

placing the 7 & 8 Geo. 4, c. 29, s. 13, to the same effect), it is absolutely necessary that the building entered should have a *covered* and *inclosed* internal communication with the principal building. The statute does not, however, say that every building having such a communication should be included, it only excludes those which have it not.

The following cases were decided previous to the 7 & 8 Geo. 4, c. 29, s. 13, which has prescribed what shall be considered a dwelling-house for the purpose of burglary.

The mere fact of a building in the neighborhood of a dwelling-house being occupied together with the dwelling-house, by the same tenant (not taking into consideration the question of the building being within the same curtilage, as to which *vide post*), will not render the former building a *dwelling-house* in point of law. The prisoner broke and entered an outhouse in the possession of G. S., and occupied by him with his dwelling-house, but not connected therewith by any fence inclosing both. The judges held that the prisoner was improperly convicted of burglary. The outhouse being separated from the dwelling-house, and not within the same curtilage, was not protected by the bare fact of its being occupied with it at the same time. *R. v. Garland*, 2 East, P. C. 493. So where a manufactory was carried on in the centre building of a great pile, in the wings of which several persons dwelt, but which had no internal communication with these wings, though the roofs of all the buildings were connected, and the entrance to all was out of the same common inclosure: upon the centre building being broken and entered, the judges held that it could not be considered as part of any dwelling-house, but a place for carrying on a variety of trades, and no parcel of the house adjoining, with none of which it had any internal communication, nor was it to be considered as under the same roof, though the roof had a connection with the roofs of the houses. *R. v. Eggington*, 2 East, P. C. 494. The house of the prosecutor was in High Street, Epsom. There were two or three houses there, insulated like Middle Row, Holborn. At the back of the houses was a public passage nine feet wide. Across this passage, opposite to his house, were several rooms, used by the prosecutor for the purposes of his house, viz., a kitchen, a coach-house, a larder and a brewhouse. Over the brewhouse a servant boy always slept, but no one else; and in this room the offence was committed. There was no *369] communication between the dwelling-house and these *buildings, except a canopy or awning over the common passage, to prevent the rain from falling on the victuals carried across. Upon a case reserved, the judges were of opinion that the room in question was not parcel of the dwelling-house in which the prosecutor dwelt, because it did not adjoin to it, was not under the same roof, and had no common fence. Graham, B., dissented, being of opinion that it was parcel of the house. But all the judges present thought that it was a distinct dwelling of the prosecutor. *R. v. Westwood*, Russ. & Ry. 495.

In the following case the building, though not within the curtilage,

and having no internal communication, was held to constitute part of the dwelling-house. The prosecutor, a farmer, had a dwelling-house in which he lived, a stable, a cottage, a cow-house, and barn, all in one range of buildings, in the order mentioned, and under one roof, but they were not inclosed by any yard or wall, and had no internal communication. The offence was committed in the barn, and the judges held this to be a burglary, for the barn, which was under the same roof, was parcel of, and enjoyed with, the dwelling-house. *R. v. Brown*, 2 East, P. C. 493. So where the premises, broken and entered, were not within the same external fence as the dwelling-house, nor had they any internal communication with it, yet they were held to be part of it. The prosecutor's dwelling-house was situate at the corner of two streets. A range of workshops adjoining the house at one side, and standing in a line with the end of the house, faced one of the streets. The roof of this range was higher than the roof of the house. At the end of this range, and adjoining to it, was another workshop projecting further into the street, and adjoining to that a stable and coach-house used with the dwelling-house. There was no internal communication between the work-shops and the dwelling-house, nor were they surrounded by any external fence. Upon a case reserved, the judges were unanimously of opinion that the workshops were parcel of the dwelling-house. *R. v. Chalking*, Russ. & Ry. 334; see also *R. v. Lithgo*, Id. 357. In the case about to be mentioned, the premises broken and entered were within the curtilage, but without any internal communication with the dwelling-house. It does not appear whether the decision proceeded upon the same ground in the last case, or whether on the ground that the building in question was within the curtilage. The prosecutor had a factory adjoining to his dwelling-house. There was no internal communication, the only way from the one to the other (within the common inclosures) being through an open passage into the factory passage, which communicated with a lumber-room in the factory, from which there was a staircase which led into the yarn-room, where the felony was committed. On a case reserved, all the judges held, that the room in question was properly described as the dwelling-house of the prosecutor. *R. v. Hancock*, Russ. & Ry. 170. See also *R. v. Clayburn*, Id. 360.

The following cases have been decided on the 7 & 8 Geo. 4, c. 29, s. 13, and will be applicable to the present statute: The prosecutor's house consisted of two long rooms, another room used as a cellar and washhouse on the ground floor, and three bedrooms upstairs. There was no internal communication between the washhouse and any of the other rooms of the house, the door of the washhouse opening into the back yard. All the buildings were under the same roof. The prisoner broke into the washhouse, and the question reserved for *the opinion of the judges was, whether this was burglary. [*370 Seven of their lordships thought that the washhouse was part of the dwelling-house, the remaining five thought it was not. *R. v. Burrowes*, 1 Mopdy, C. C. 274. The ground for holding the building not to be excluded by the statute appearing to be that the statute only

applied to such buildings within the curtilage as were *not* part of the dwelling-house, and that this building was part of the dwelling-house. Such a construction of the statute would seem to leave the question much as it stood before.

Behind the dwelling-house there was a pantry; to get to the pantry from the house it was necessary to pass through the kitchen into a passage; at the end of the passage there was a door, on the outside of which, on the left hand, was the door of the pantry. When the passage door was shut the pantry door was excluded, and open to the yard; but the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry-door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was a "to-fall," and leaned against the wall of an inner pantry, in which there was a lachet window common to both, and which opened between them; but there was no door of communication. The inside pantry was under the same roof as the dwelling-house. The prisoner entered the outer pantry by a window which looked towards the yard, having first cut away the hair-cloth nailed to the window-frame. Taunton, J., held that the outer pantry was not part of the dwelling-house within the above clause, and consequently that no burglary had been committed. *R. v. Somerville*, 2 Lew. C. C. 113; see also *R. v. Turner*, 6 C. & P. 407, 25 E. C. L.

In *R. v. Higgs*, 2 C. & K. 322, 61 E. C. L., it appeared that adjoining to the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house, and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roof of the dwelling-house, kiln, and dairy were of different heights. Wilde, C. J., held that the dairy was not a part of the dwelling-house.

It would seem from the latter case that the decision in *R. v. Burrows* has not been very strictly followed.

Proof of the premises being a dwelling-house—occupation. It must appear that the premises in question were, at the time of the offence, occupied as a *dwelling-house*.¹ Therefore, where a house was under repair, and the tenant had not entered into possession, but had deposited some of his goods there, but no one slept in it, it was held

¹ A description in the indictment of the house, as "then and there occupied and controlled" by a person named is sufficient. *Sullivan v. State*, 13 Tex. App. 462. So a description in the indictment of the house as "the infirmary of Morgan County." *Davis v. State*, 33 Ohio St. 505. An allegation that the owner is unknown, but that the building is in the possession, care, and control of a certain railroad is sufficient. *State v. McIntire*, 59 Iowa, 264. Where in an indictment, ownership is alleged it is not variance if the evidence does not sustain an occupancy by some one, also alleged. *State v. Dan*, 18 Nev. 345; *Commonwealth v. Reynolds*, 122 Mass. 454; *Anderson v. State*, 48 Ala. 665. An allegation that the house is the house of William Drake is not sustained by evidence that the house entered is the Drake House, kept by Mr. Drake. *Jackson v. State*, 55 Wis. 589. Saint Bridget's Church is a term of description and does not allege ownership. *Wilson v. State*, 34 Ohio St. 199.

not to be a dwelling-house, so as to make the breaking and entering a burglary. *R. v. Lyon*, 1 Leach, 185; 2 East, P. C. 497. Nor will the circumstance of the prosecutor having procured a person to sleep in the house (not being one of his own family) for its protection, make any difference. Thus where a house was newly built and finished in every respect, except the painting, glazing, and flooring of one garret, and a workman, who was constantly employed by the prosecutor, slept in it for the purpose of protecting it, but no part of the prosecutor's domestic family had taken possession, it was held at the Old Bailey, on the authority of *R. v. Lyon* (*supra*), that it was not the dwelling-house of the prosecutor. *R. v. Fuller*, 1 Leach, *186 (n). So where the prosecutor took a house, and deposited [371 some of his goods in it, and not having slept there himself, procured two persons (not his own servants) to sleep there for the purpose of protecting the goods, it was held at the Old Bailey, that as the prosecutor had only in fact taken possession of the house so far as to deposit certain articles of his trade therein, but had neither slept in it himself, nor had any of his servants, it could not in contemplation of law be called his *dwelling-house*. *R. v. Harris*, 2 Leach, 701; 2 East, P. C. 498. See also *R. v. Hallard*, *coram Buller, J.*, 2 Leach, 701 (n); *R. v. Thompson*, 2 Leach, 771. The following case, decided upon the construction of the statute 12 Anne, c. 7 (repealed), is also an authority on the subject of burglary: The prosecutor, a publican, had shut up his house, which in the daytime was totally uninhabited, but at night a servant of his slept in it to protect the property left there, which was intended to be sold to the incoming tenant, the prosecutor having no intention of again residing in the house himself. On a case reserved, the judges were of opinion, that as it clearly appeared by the evidence of the prosecutor that he had no intention whatever to reside in the house, either by himself or his servants, it could not in contemplation of law be considered as his dwelling-house, and that it was not such a dwelling-house wherein burglary could be committed. *R. v. Davies*, *alias Silk*, 2 Leach, 876; 2 East, P. C. 499. Where some corn had been missed out of a barn, the prosecutor's servant and another person put a bed in the barn, and slept there, and upon the fourth night the prisoner broke and entered the barn; upon a reference it was agreed by all the judges, that this sleeping in the barn made no difference. *R. v. Brown*, 2 East, P. C. 497. So a porter lying in a warehouse, *to watch goods*, which is solely for a particular purpose, does not make it a dwelling-house. *R. v. Smith*, 2 East, P. C. 497.

Where no person sleeps in the house, it cannot be considered a dwelling-house. The premises where the offence was committed consisted of a shop and parlor, with a staircase to a room over. The prosecutor took it two years before the offence committed, intending to live in it, but remained with his mother, who lived next door. Every morning he went to his shop, transacted his business, dined, and stayed the whole day there, considering it as his home. When he first bought the house he had a tenant, who quitted it soon after-

wards, and from that time no person had slept in it. On a case reserved, all the judges held, that this was not a dwelling-house. *R. v. Martin, Russ. & Ry.* 108. It seems to be sufficient if any part of the owner's family, as his domestic servants, sleep in the house. A. died in his house. B., his executor, put servants into it, who lodged in it, and were at board wages, but B. never lodged there himself. Upon an indictment for burglary, the question was, whether this might be called the mansion-house of B. The court inclined to think that it might, *because the servants lived there*; but upon the evidence there appeared no breach of the house. *R. v. Jones*, 2 East, P. C. 499.

Proof of the premises being a dwelling-house—occupation—temporary absence. A house is no less a dwelling-house, because at certain periods the occupier quits it, or quits it for a temporary purpose. "If A.," says Lord Hale, "has a dwelling-house, and he and all his family are absent a night or more, and in their absence, in the night *372] *a thief breaks and enters the house to commit felony, this is burglary." 1 Hale, P. C. 556; 3 Inst. 64. So if A. have two mansion-houses, and is sometimes with his family in one, and sometimes in the other, the breach of one of them, in the absence of his family, is burglary. *Id.* 4 Rep. 40, a. Again, if A. have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in vacation his chamber or study is broken open, this is burglary. *R. v. Evans*, Cro. Car. 473; 1 Hale, P. C. 556. The prosecutor being possessed of a house in Westminster in which he dwelt, took a journey into Cornwall, with intent to return and move his wife and family out of town, leaving the key with a friend to look after the house. After he had been absent a month, no person being in the house, it was broken open, and robbed. He returned a month after with his family, and inhabited there. This was adjudged burglary, by Holt, C. J., Treby, J., and four other judges. *R. v. Murry*, 2 East, P. C. 496; Foster, 77.

In these cases the owner must have quitted his house *animo reverendi*, in order to have it still considered as his mansion, if neither he nor any part of his family were in at the time of the breaking and entering. 2 East, P. C. 496. The prosecutor had a house at Hackney, which he made use of in the summer, his chief residence being in London. About the latter end of the summer he removed to his town house, bringing away a considerable part of his goods. The following November his house at Hackney was broken open, upon which he removed the remainder of his furniture, except a few articles of little value. Being asked whether at this time he had any intention of returning to reside, he said he had not come to any settled resolution, whether to return or not, but was rather inclined totally to quit the house and let it. His house was broken open in the January following. The court (at the Old Bailey) were of opinion, that the prosecutor having left the house and disfurnished it, without any settled resolution to return, but rather inclining to the contrary, it

could not be deemed his dwelling-house.¹ *R. v. Nutbrown*, Foster, 77; 2 East, P. C. 496. See *R. v. Flannagan*, Russ. & Ry. 187.

Occupation, how to be described. It is sometimes quite clear that the building is a dwelling-house, but doubtful in whose occupation it is; this is a point on which prosecutions for burglary frequently used to fail; but now that by the 14 & 15 Vict. c. 100, s. 1, the indictment might generally be amended (*supra*, p. 209), it is of much less importance. The following cases have been decided on the subject:—

Occupation, how to be described—house divided, without internal communication, and occupied by several. Where there is an actual severance in fact of the house, by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, the part so separately occupied is the dwelling-house of the person living in it, provided he dwell there. If A. lets a shop, parcel of his dwelling-house, to B. for a year, and B. holds it, and works or trades in it, but lodges in his own house at night, and the shop is broken open, it cannot be laid to be the dwelling-house of A., for it was severed by the lease during the term; but if B. or his servants sometimes lodge in the shop, it is the mansion-house of B., and burglary may be committed in it. 1 Hale, P. C. *557; *vide R. v. Sefton, infra*. The prosecutors, Thomas Smith and John Knowles, were in partnership, and lived next door to [*373 each other. The two houses had formerly been one, but had been divided, for the purpose of accommodating the families of both partners, and were now perfectly distinct, there being no communication from one to the other, without going into the street. The house-keeping, servants' wages, etc., were paid by each partner respectively, but the rent and taxes of both the houses were paid jointly out of the partnership fund. The offence was committed in the house of the prosecutor Smith. On the trial, before Eyre, C. B., and Gould, J., at the Old Bailey, it was objected that the burglary ought to have been laid to be in the dwelling-house of the prosecutor Smith only; and of this opinion was the court. *R. v. Martha Jones*, 1 Leach, 537; 2 East, P. C. 504. But it is otherwise where there is an internal communication. Thus where a man let part of his house, including his shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and

¹ Burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town; though neither the prosecutor nor his family had ever lodged in the house, in which the crime is charged to have been committed, but merely visited it occasionally. *Commonwealth v. Brown*, 2 Rawls, 207. Not necessary that anybody should be inside the house to constitute burglary. *State v. Reed*, 20 Ia. 413. Breaking and entering a dwelling-house, with intent to steal, is burglary, although the house be unoccupied at the time. *State v. Meerhouse*, 34 Mo. 344. S.

Absence from home with *animus revertendi* will not deprive a house of its *status* as a "dwelling-house" in an indictment for burglary. *Harrison v. State*, 74 Ga. 801.

they were open to the father's part of the house, and the son never slept in the part so let to him, the prisoner being convicted of a burglary in the shop, laid as the dwelling-house of the father, the conviction was held by the judges to be right, it being under the same roof, part of the same house, and communicating internally. *R. v. Sefton*, 2 Russ. 5th ed. 16; Russ. & Ry. 203. Chambers in the inns of court are to all purposes considered as distinct dwelling-houses, and therefore whether the owner happens to enter at the same outer door or not, will make no manner of difference. The sets are often held under distinct titles, and are, in their nature and manner of occupation, as unconnected with each other as if they were under separate roofs. 2 East, P. C. 505; 1 Hale, P. C. 556.

Occupation, how to be described, where there is an internal communication, but the parts are occupied by several, under different titles. Although in the case of lodgers and inmates who hold under one general occupier, the whole of the house continues to be his dwelling-house, if there be an internal communication, and the parties have a common entrance, *vide infra*, yet it is otherwise where several parts of a building are let under distinct leases. The owner of a dwelling-house and warehouse under the same roof, and communicating internally, let the house to A. (who lived there), and the warehouse to A. & B., who were partners. The communication between the house and warehouse was constantly used by A. The offence was committed in the warehouse, which was laid to be the dwelling-house of A. On a case reserved, the judges were of opinion that this was wrong, A. holding the house in which he lived under a demise to himself alone, and the warehouse under a distinct demise to himself and B. *R. v. Jenkins*, Russ. & Ry. 244.¹

Occupation, how to be described—lodgers. Where separate apartments were let in a dwelling-house to lodgers, it seems formerly to have been doubted whether they might not in all cases be described as the mansion-house of the lodgers.² 2 East, P. C. 505; Hawk, P. C. b. 1, c. 38, ss. 13, 14. But the rule is now taken to be, according to the opinion of Kelynge, 84, that if the owner, who lets out apartments in his house to other persons, sleeps under the same roof, *374] *and has but one outer door common to himself and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and his lodgers enter by different outer doors, the apartments so let are the mansion, for the time being, of each lodger respectively. And accordingly it was so ruled by Holt, C. J., at the Old Bailey, in 1701, although in that case the rooms were

¹ A breaking and entering a room or rooms in a tenement-house, rented to a separate family, with an outer door and entry common to all, is a burglary. *Mason v. People*, 26 N. Y. 200. S.

² A guest at a hotel who feloniously breaks into the room allotted to another guest is guilty of burglary. *State v. Clark*, 48 Vt. 629. S.

let for a year, under a rent, and Tanner, an ancient clerk in court, said that this was the constant course and practice. 2 East, P. C. 505; 1 Leach, 90 (n). Where one of two partners is the lessee of a shop and house, and the other partner occupies a room in the house, he is only regarded as a lodger. Morland & Gutteridge were partners; Morland was the lessee of the whole premises, and paid all the rent and taxes for the same. Gutteridge had an apartment in the house, and paid Morland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The burglary was committed in the shop, which was held to be the dwelling-house of Morland, and the judges held the description right. *R. v. Parmenter*, 1 Leach, 537 (n). In the following cases, the apartments of the lodger were held to be his dwelling-house: The owner let the whole of a house to different lodgers. The prosecutor rented the first floor, a shop and a parlor on the ground floor, and a cellar underneath the shop, at 12*l.* 10*s.* a year. The owner took back the cellar to keep lumber in, for which he allowed a rebate of 40*s.* a year. The entrance was into a passage, by a door from the street, and on the side of the passage one door opened into the shop, and another into the parlor, and beyond the parlor was the staircase which led to the upper apartments. The shop and parlor doors were broken open, and the judges determined, that these rooms were properly laid to be the dwelling-house of the lodger, for it could not be called the mansion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purpose before mentioned. *R. v. Rogers*, 1 Leach, 89, 428; 2 East, P. C. 506, 507; Hawk. P. C. b. 1, c. 38, s. 29.

The house in which the offence was committed belonged to one Nash, who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week. John Jordan, the prosecutor, had two rooms, viz., a sleeping-room, and a workshop in the garret, which he rented by the week as tenant at will to Nash. The workshop was broken and entered by the prisoner. Ten judges, on a case reserved, were unanimously of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment properly charged it to be the dwelling-house of Jordan. *R. v. Carrell*, 1 Leach, 237, 429; 2 East, P. C. 506. The prisoner was indicted under the repealed statute 3 & 4 Will. & M. c. 9, s. 1, for breaking and entering a dwelling-house and stealing therein. The house was let out to three families, who occupied the whole. There was only one outer door, common to all the inmates. J. L. (whose dwelling-house it was laid to be) rented a parlor on the ground floor, and a single room up one pair of stairs, where he slept. The judges were of opinion, that the indictment rightly charged the room to be the dwelling-house of J. L. *R. v. Trapshaw*, 1 Leach, 427; 2 East, P. C. 506, 780.

It follows from the principle of the above cases, that if a man lets out part of his house to lodgers, and continues to inhabit the rest *himself, if he breaks open the apartment of a lodger, [*375

and steals his goods, it is a felony only, and not a burglary; for it cannot be burglary to break open his own house. 2 East, P. C. 506; Kel. 84.

Occupation, how to be described—by wife or family. The actual occupation of the premises by any part of the prosecutor's domestic family will be evidence of its being his dwelling-house. The wife of the prosecutor had for many years lived separate from her husband. When she was about to take the house in which the offence was afterwards committed, the lease was prepared in her husband's name; but he refused to execute it, saying he would have nothing to do with it; in consequence of which, she agreed with the landlord herself, and constantly paid the rent herself. Upon an indictment for breaking open the house, it was held to be well laid to be the dwelling-house of the husband. *R. v. Farre*, Kel. 43, 44, 45. In a similar case, where there was the additional fact, that the wife had a separate property vested in trustees, the judges were clear that the house was properly laid to be the dwelling-house of the husband. It was the dwelling-house of some one. It was not the wife's; because, at law, she could have no property; it was not the trustees', because they had nothing to do with it; it could then only be the husband's. *R. v. French*, Russ. & Ry. 491.¹ So where the owner of a house who had never lived in it, permitted his wife, on their separation, to reside there, and the wife lived there in adultery with another man, who paid the expenses of housekeeping, but neither rent nor taxes, this was held by the judges to be properly described as the dwelling-house of the husband. *R. v. Wilford*, Russ. & Ry. 517; and see *R. v. Smith*, 5 C. & P. 203, 24 E. C. L. Where a prisoner was indicted for breaking into the house of Elizabeth A., and it appeared that her husband had been convicted of felony, and was in prison under his sentence when the house was broken into, it was held on a case reserved, that the house was improperly described, although the wife continued in possession of it. *R. v. Whitehead*, 9 C. & P. 429, 38 E. C. L. But if a case should arise, in which the law would adjudge the separate property of the mansion to be in the wife, she having also the exclusive possession, it should seem that in such case the burglary would properly be laid to be in her mansion-house, and not in that of her husband. 2 East, P. C. c. 15, s. 16; 2 Russ. Cri. 25, 5th ed. If the house were the separate property of the wife under the 45 & 46 Vict. c. 75, it would be sufficient to describe it as her house. (See sect. 12; see also 20 & 21 Vict. c. 85, ss. 21, 25.)

Occupation, how to be described—by clerks and agents in public offices, companies, etc. An agent or clerk employed in a public office, or by persons in trade, is in law the servant of those parties, and if he be suffered to reside upon the premises, which belong

¹ A wife who had a separate estate leased a house in which she and her husband lived. Held, that in an indictment for burglary the ownership of the house was properly laid in the wife. *State v. Trapp*, 17 S. C. 467.

to the government, or to the individuals employing him, the premises cannot be described as his dwelling-house. Three persons were indicted for breaking into the lodgings of Sir Henry Hungate, at Whitehall, and the judges were of opinion, that it should have been laid to be the King's mansion-house at Whitehall. *R. v. Williams*, 1 Hale, P. C. 522, 527. The prisoner was indicted for breaking into a chamber in Somerset-house, and the apartment was laid to be the mansion-house of the person who lodged there; but it was held bad, because the whole house belonged to the Queen-mother. *R. v. Burgess*, Kel. 27. The *prisoner was indicted under the 12 Anne, c. 7 (repealed), for [*376 stealing a gold watch in the dwelling-house of W. H. Bunbury, Esq. The house was the invalid office at Chelsea; an office under government. The ground-floor was used by the paymaster-general, for the purpose of conducting the business relating to the office. Mr. Bunbury occupied the whole of the upper part of it; but the rent and taxes of the whole were paid by government. The court (at the Old Bailey) held that it was not the dwelling-house of Mr. Bunbury. *R. v. Peyton*, 1 Leach, 324; 2 East, P. C. 501. The prisoner was indicted for burglary in the mansion-house of Samuel Story. It appeared that the house belonged to the African Company, and that Story was an officer of the company, and had separate apartments, and lodged and inhabited there: but Holt, C. J., Tracy, J., and Bury, B., held this to be the mansion-house of the company, for though an aggregate corporation cannot be said to inhabit anywhere, yet they may have a mansion-house for the habitation of their servants. *R. v. Hawkins*, 2 East, P. C. 501; Foster, 38. So it was held with regard to the dwelling-house of the East India Company, inhabited by their servants. *R. v. Pickett*, 2 East, P. C. 501. The prisoner was indicted for breaking and entering the house of the master, fellows, and scholars of Bennet College, Cambridge. The fact was he broke into the buttery of the college, and there stole some money, and it was agreed by all the judges to be burglary. *R. v. Maynard*, 2 East, P. C. 501. The governor of the Birmingham workhouse was appointed under contract for seven years, and had the chief part of the house for his own occupation; but the guardians and overseers who appointed him, reserved to themselves the use of one room for an office, and of three others for store-rooms. The governor was assessed for the house, with the exception of these rooms. The office being broken open, it was laid to be the dwelling-house of the governor; but, upon a case reserved, the judges held the description wrong. *R. v. Wilton*, Russ. & Ry. 115. So a club-house is wrongly described as the dwelling-house of the house-steward who sleeps in the club-house, and has the charge of, and is responsible for, the plate in it. *R. v. Ashley*, 1 C. & K. 198, 47 E. C. L.

The following case appears to be at variance with previous authorities, and it may be doubted whether it is to be considered as law: The prosecutor, Sylvester, kept a blanket warehouse on Goswell-street, and resided with his family in the house over the warehouse, which was on the ground-floor, and consisted of four rooms, the second of which

was the room broken open. There was an internal door between the warehouse and the dwelling-house. The blankets were the property of a company of blanket manufacturers at Whitney, in Oxfordshire, none of whom ever slept in the house. The whole rent, both of the dwelling-house and warehouse, was paid by the company, to whom Sylvester acted as servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free. The lease of the premises was in the company. The court (Graham, B., and Grose, J.), were clearly of opinion that it was rightly charged to be the dwelling-house of Sylvester; for though the lease of the house was held, and the whole rent reserved paid by the company in the country, yet as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense to consider it as their dwelling-house, especially as it was *377] *evident that the only purpose in holding it was to furnish a dwelling to their agent, and ware-rooms for the commodities therein deposited. It was the means by which they in part remunerated Sylvester for his agency, and was precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent. The bargain, however, the court observed, took another shape. The company preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein toward the salary which he was to receive from them. It was, therefore, essentially and truly, the dwelling of the person who occupied it. The punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose; but it would be absurd to suppose that the terror which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at Witney. *R. v. Margett*, 2 Leach, 930. It has been observed, that the accuracy of the reason given in the above judgment, with regard to protecting the actual occupant, may, perhaps, be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the indictment as committed in the dwelling-house of the real owner. And with respect to the terror in this case not having affected the company at Witney, the same might have been said of the terror to the East India Company or the African Company, in the cases of burglary in their houses. In the course of this case, Mr. Justice Grose inquired if there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived; and Mr. Knapp informed the court that his father was clerk to the Haberdashers' Company, and resided in the hall, which was broken open, and in that case the court held it to be his father's house. 2 Leach, 931 (n). The case of *R. v. Margett*, however, appears to be supported by a more recent decision. The prosecutor was secretary to the Norwich Union Insurance Company, and lived with his family in

the house used as the office of the company, who paid the rent and taxes. The burglary was in breaking into a room used for the business of the company. The recorder, on the authority of *R. v. Margett*, and the case of the clerk of the Haberdashers' Company there mentioned, thought the indictment correct, but reserved the point for the judges, who were of opinion that the house was rightly described as the prosecutor's, since he, his family, and servants were the only persons who dwelt there; and they only were liable to be disturbed by a burglary. Though their lordships would not say that it might not have been described as the company's house, they thought it might, with equal propriety, be described as the prosecutor's. *R. v. Witt*, 1 Moody, C. C. 248. It is perhaps safer in cases like those cited above to lay the property in the house differently in different counts, though any variance in this respect would no doubt be now amended, *ante*, p. 372.

Occupation, how to be described—by servants occupying as such. Where a servant occupies a dwelling-house, or apartments therein, as a *servant*, his occupation is that of his master, and the house is the dwelling-house of the latter. But it is otherwise where the servant occupies *suo jure* as tenant. Thus, apartments in the king's palaces, or in the houses of noblemen, for their stewards and chief servants, *can only be described as the dwelling-house of the king or noblemen. Kel. 27; 1 Hale, P. C. 522, 527. Graydon, a [*378 farmer, had a dwelling-house and cottage under the same roof, but they were not inclosed by any wall or court-yard, and had no internal communication. Trumball, a servant of Graydon, and his family, resided in the cottage by agreement with Graydon, when he entered his service. He paid no rent, but an abatement was made in his wages on account of the cottage. The judges (Buller, J., *dub.*) held that this was no more than a licence to Trumball to lodge in the cottage, and did not make it his dwelling-house. *R. v. Brown*, 2 East, P. C. 501.

The prosecutors were partners as bankers, and also as brewers, and were the owners of the house in question, used in both concerns. There were three rooms, with only one entrance by a door from the street. No one slept in these rooms. The upper rooms of the house were inhabited by John Stevenson, the cooper employed in the brewing concern. He was paid half a guinea a week, and permitted to have these rooms for the use of himself and family. There was a separate entrance from the street to these rooms. There was no communication between the upper and lower floor, except by a trap-door (the key of which was left with Stevenson) and ladder not locked or fastened, and not used. Stevenson was assessed to the window-tax for his part of the premises, but the tax was paid by his masters. It being objected that the place where the burglary was committed was not the dwelling-house of the prosecutors, the point was reserved, when eight of the judges thought that Stevenson was not a tenant, but inhabited only in the course of his service. Four of the judges were of a contrary opinion. Lord Ellenborough, C. J., said—"Ste-

venson certainly could not have maintained trespass against his employers if they had entered these rooms without his consent. Does a gentleman who assigns to his coachman the rooms over his stables thereby make him a tenant? The act of the assessors, whether right or wrong, in assessing Stevenson for the windows of the upper room, can make no difference; nor is it material which of the two trades the prosecutor carried on; Stevenson was servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with Stevenson, and the door was never fastened, and it can make no difference whether the communication between the upper and lower rooms was through a trap-door or by a common staircase." *R. v. Stockton and Edwards*, 2 Leach, 1015; 2 Taunt. 339; s. c. under the name of *R. v. Stock* and another, Russ. & Ry. 185. See 2 Russ. Cri. 27, 5th ed.; *R. v. Flannagan*, Russ. & Ry. 187, *infra*.

In order to render the occupation of a servant the occupation of the master, it must appear that the servant is, properly speaking, such, and not merely a person put into the house for the purpose of protecting it. The prosecutor left the dwelling-house, keeping it only as a warehouse and workshop, without any intention of again residing in it. In consequence of his thinking it not prudent to leave the house without some one in it, two women, employed by him as work-women in his business, and not as domestic servants, slept there to take care of the house, but did not take their meals there or use the house for any other purpose than that of sleeping there. Upon an indictment for stealing goods to the amount of more than 40s., in the dwelling-house of the prosecutor, the judges held that this could not be considered his dwelling-house. *R. v. Flannagan*, Russ. & Ry. 187.

*379] *It is difficult to distinguish this case from that of *R. v. Stockton*, 2 Leach, 1015, *supra*, which received an opposite decision. Still, though the object of the owner of the house in putting in his servants, be to protect his property only, yet if *they live there*, their occupation will be deemed his occupation, and the house may be described as his dwelling-house. The shop broken open was part of a dwelling-house which the prosecutor had inhabited. He had left the dwelling-house and never meant to live in it again, but retained the shop and let the other rooms to lodgers; after some time he put a servant and his family into two of the rooms, lest the place should be robbed, and they lived there. Upon a case reserved, the judges thought that putting in a servant and his family *to live* was very different from putting them in merely to sleep, and that this was still to be deemed the prosecutor's house. *R. v. Gibbons*, 2 Russ. Cri. 23, 5th ed. J. B. worked for one W., who did carpenter's work for a public company, and had put J. B. into the house in question to take care of it and of some mills adjoining, J. B. receiving no more wages after than before he went to live in the house; it was held that the house was not rightly described as the house of J. B. *R. v. Rawlins*, 7 C. & P. 150, 32 E. C. L. See *R. v. Ashley*, 1 C. & K. 198, *ante*, p. 376, 47 E. C. L.

Occupation, how to be described—by servants—as tenants.

Where a servant occupies part of the premises belonging to his master, not as in the cases above mentioned, *ante*, p. 377, in the capacity of *servant*, but in the character of tenant, the premises must be described as his dwelling-house. Greaves & Co. had a house and building where they carried on their trade. Mottran, their warehouseman, lived with his family in the house, and paid 11*l.* per annum for rent and coals (the house alone being worth 20*l.* per annum). Greaves & Co. paid the rent and taxes. The judges were of opinion that this could not be said to be the dwelling-house of Greaves & Co. They thought that as Mottran stood in the character of tenant (for Greaves & Co. might have distrained upon him for his rent, and could not arbitrarily have removed him), Mottran's occupation could not be deemed their occupation. *R. v. Jarvis*, 1 Moody, C. C. 7.¹

Nor is it necessary, in order to invest the servant with the character of tenant, that he should pay a rent, if, from other circumstances of the case, it appears that he holds as tenant. The prosecutor (Gent), a collier, resided in a cottage built by the owner of the colliery for whom he worked. He received 15*s.* a week as wages, besides the cottage, which was free of rent and taxes. The prisoner being indicted for burglary, in the dwelling-house of the prosecutor, Holroyd, J., was of opinion, that though the occupation and enjoyment of the cottage were obtained by reason of Gent being the servant of the owner, and were co-extensive only with the hiring, yet that his inhabiting the cottage was not, as in the cases referred to (2 East, P. C. 500), correctly speaking, merely as the servant of the owner, nor was it either as to the whole or any part of the cottage, as his (the owner's) occupation, or for his use or business, or that of the colliery, but wholly for the use and benefit of Gent himself and his family, in like manner as if he had been paid the rent and taxes; and though the servant's occupation might in law, at the master's election, be considered as the occupation of the master and not of the servant, yet with regard to third persons it might be considered either as the occupation of the master or servant. The point was, however, reserved *for the opinion of the judges, who held that the cottage might be described as the dwelling-house of Gent. *R. v. Jobling*, [*380 Russ. & Ry. 525. A toll-house was occupied by a person employed by the lessee of the tolls at weekly wages as collector, and as such he had the privilege of living in the toll-house. The judges were unanimously of opinion that the toll-house was rightly described as his dwelling-house; for he had the exclusive possession of it, and it was unconnected with any premises of the lessee, who did not appear to have any interest in it. *R. v. Camfield*, 1 Moody, C. C. 42. So where a person who has been servant remains, on the tenant's quitting, upon the premises, not in the capacity of servant, they may be described as his dwelling-house. Lord Spencer let a house to Mr. Stephens, who underlet it. The sub-lessee failed and quitted, and no one remained

¹ Where a tenancy exists, the building entered may be alleged to be the property of either the tenant in possession or of the landlord. *Kennedy v. State*, 81 Ind. 379.

in the house but Ann Pemberton, who had been servant to the sub-lessee. Stephens paid her 15s. a week till he died, when she received no payment, but continued in the house. At Michaelmas it was given up to Lord Spencer, but Ann Pemberton was permitted by the steward to remain in it. Bayley, J., thought Ann Pemberton might be considered tenant at will, but reserved the point for the opinion of the judges, who held that the house was rightly laid in the indictment as the dwelling-house of Ann Pemberton, as she was there, not as a servant, but as a tenant at will. *R. v. Collet*, Russ. & Ry. 498. Where a gardener lived in a house of his master, quite separate from the dwelling-house of the latter, and had the entire control of the house he lived in and kept the key, it was held that it might be laid either as his or as his master's house. *R. v. Rees*, 7 C. & P. 568, 32 E. C. L.

Occupation, how to be described—by guests, etc. If several persons dwell in one house, as guests or otherwise, having no fixed or certain interest in any part of the house, and a burglary be committed in any of their apartments, it seems clear that the indictment ought to lay the offence in the mansion-house of the proprietor. *Hawk. P. C. b. 1, c. 38, s. 26*. Therefore, where the chamber of a guest at an inn is broken open, it shall be laid to be the mansion-house of the innkeeper, because the guest has only the use of it, and not any certain interest, 1 Hale, P. C. 557. It has been said that if the host of an inn break the chamber of his guest in the night to rob, this is burglary. *Dalton, c. 151, s. 4*. But it has been observed that this may be justly questioned; for that there seems no distinction between this case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer-door as himself, which Kelynge says cannot be burglary. *Kel. 84; 2 East, P. C. 582*. It is said by Lord Hale, that if A. be a lodger in an inn, and in the night opens his chamber-door, steals the goods in the house, and goes away, it may be a question whether this be burglary; "and," he continues, "it seems not, because he had a special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house, but if he had opened the chamber of B., a lodger in the inn, to steal his goods, it had been burglary." 1 Hale, P. C. 554. It has been observed that the reasoning in the following case is opposed to the distinction taken by Lord Hale, and that the case of a guest at an inn breaking his own door to steal goods in the night, falls under the same consideration as a servant under like circumstances. 2 East, P. C. 503. The prosecutor, a Jew pedlar, came to the house of one Lewis, a publican, to stay all night, and fastened the door of his *chamber. The prisoner pretended to Lewis that the prosecutor had stolen his goods, and under this pretence, with the assistance of Lewis and others, forced the chamber-door open, and stole the prosecutor's goods; Adams, B., doubted whether the chamber could be properly called the dwelling-house of the prosecutor, being really a part of the dwelling-house of the innkeeper. Upon a case reserved, the judges all thought that though the prosecutor had for that night

a special interest in the bedchamber, yet it was merely for a particular purpose, viz., to sleep there that night as travelling guest, and not as a regular lodger; that he had no certain and permanent interest in the room itself, but both the property and possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in the room, even for the goods now in question, which he could not be, unless that room were deemed to be in his possession; and that the landlord might go into the room when he pleased, and would not be a trespasser to his guest. *R. v. Prosser*, 2 East, P. C. 502.

Occupation, how to be described—partners. Where one of several partners is the lessee of the premises where the business is carried on, and another partner occupies an apartment there, and pays for his board and lodging, the latter, as already stated, will be considered as a lodger only. *R. v. Parmenter*, 1 Leach, 537 (n), *ante*, p. 374. But where the house is the joint property of the firm, and one of the partners and the persons employed in the trade live there, it is properly described as the dwelling-house of the firm. *R. v. Athea*, 1 Moody, C. C. 329.¹

Proof of the parish—the local description. If it be not expressly stated where the dwelling-house is situated, it is taken to be situated at the place named in the indictment by way of special venue. 14 & 15 Vict. c. 100, s. 23, *supra*, p. 248. And if two parishes having been named, the house is stated to be “at the parish aforesaid,” the last parish shall be intended. *R. v. Richards*, 1 Moo. & R. 177. Where an indictment for burglary charged that the prisoners, “late of Norton juxta Kempsey, in the county of Worcester,” “at Norton juxta Kempsey aforesaid, the dwelling-house of T. Hooke, there situate,” feloniously did break and enter, etc., and it appeared that Norton juxta Kempsey was a chapelry and perpetual curacy, it was objected that the indictment ought to have stated Norton juxta Kempsey to be a chapelry, or described it in some other manner. But Patteson, J., held that *R. v. Napper*, 1 Moo. C. C. 44, was a sufficient authority to show that this indictment was good. There it was held that an indictment alleging that the prisoner at “Liverpool,” did break and enter a dwelling-house “there situate,” was good; and there was no reason why an indictment alleging a burglary at “Norton juxta Kempsey” was not also good, it being proved that there was such a district. *R. v. Brookes and others*, 2 Russ. Cri. 45, 5th ed.; Car. & M. 544. A variance between the description in the indictment and the evidence is amendable, under 14 & 15 Vict. c. 100, s. 1, *ante*, p. 209.

Proof of the offence having been committed in the night-time. With regard to what shall be esteemed *night*, it is said by Lord Hale to have been anciently held, that after sunset, though daylight be not

¹ But see *People v. Edwards*, 59 Cal. 352.

*382] *quite gone, or before sun-rising, is *noctanter*, to make a burglary (Dalt. c. 99; Crompt. 22, b.); but he adds, that the better opinion has been, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun, or *crepusculum*, it is not night. 1 Hale, P. C. 550; 3 Inst. 63. This rule, however, does not apply to moonlight, otherwise many burglaries might pass unpunished. 1 Hale, 551; 4 Bl. Com. 224. Now by the 24 & 25 Vict. c. 96, s. 1, "for the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the succeeding day."¹

The prosecutor must prove that both the breaking and entering took place in the night-time, but it is not necessary that both should have taken place on the same night. It is said by Lord Hale, that if thieves break a hole in the house one night, to the intent to enter another night and commit a felony through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both *noctanter*, though not the same night, and it shall be supposed they broke and entered the night they entered, for the breaking makes not the burglary till the entry. 1 Hale, P. C. 551. This point was decided in the following case: During the night of Friday, the side-door of the prosecutor's house, which opened into a public passage, had all the glass taken out by the prisoner, with intent to enter, and on the Sunday night, the prisoner entered through the hole thus made. On a case reserved, the judges were of opinion, that the offence amounted to a burglary, the breaking and entry being both by night. And although a day elapsed between the breaking and entering, yet the breaking was originally with intent to enter. *R. v. Smith, Russ. & Ry.* 417. See also, *R. v. Jordan, ante*, p. 365.

"If the breaking of the house," says Lord Hale, "were done in the day-time, and the entering in the night, or the breaking in the night and the entering in the day, that will not be burglary; for both make the offence, and both must be *noctanter*. 1 Hale, P. C. 551, citing Crompt. 33, a. ex. 8 ed. 2. Upon this, the annotator of Lord Hale observes, that "the case cited does not fully prove the point it is brought for, the resolution being only, that if thieves enter in the night

¹The night-time consists of the period from the termination of daylight in the evening to the earliest dawn of the next morning. *State v. Bancroft*, 10 N. H. 105. An indictment for burglary may be supported by circumstantial evidence, and it is not necessary to show that the entry could not have been made in the day-time. *State v. Bancroft*, 10 N. H. 105. It having been proved that the prisoner was seen on the day after the burglary, for which he was indicted, under very suspicious circumstances, near the place where it was committed, it was competent to prove that the implements used came from his home. *People v. Larned*, 3 Seld. 445.

An indictment for burglary which omits to charge that it was committed "in the night-time" is fatally defective. *Commonwealth v. Kass*, 3 Brewst. 422; *Methard v. State*, 19 O. St. 363. S.

The burden of proof that the burglary was committed in the night-time is on the State. It cannot be presumed or inferred. *Waters v. State*, 53 Ga. 567. Evidence of the prosecutor that he left his store after dark and returned between daylight and sunrise held sufficient to warrant a finding that the breaking was in the night. *Houser v. State*, 58 Ga. 78; *Brown v. State*, 59 Ga. 456.

at a hole in the wall which was there before, it is no burglary; but it does not appear who made the hole." 1 Hale, P. C. 551 (n). It is observed by Mr. Serjeant Russell, that it is elsewhere given as a reason by Lord Hale, why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves broke and entered in the night when they entered; for that the breaking makes not the burglary till the entry; and the learned writer adds, that "this reasoning, if applied to a breaking in the day-time, and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entry a burglary." 2 Russ. Cri. 37, 5th ed.; and see 2 East, P. C. 509. It would seem, however, to be carrying the presumption much further than in the case put by Lord Hale; and it may well be doubted whether, in such a case, the offence would be held to amount to burglary.

Proof of intent—to commit felony—felony at common law, or by statute. The prosecutor must prove that the dwelling-house was broken and entered with intent to commit a felony therein.¹

*Evidence that a felony was actually committed is evidence that the house was broken and entered with intent to commit that [*383 offence. 1 Hale, P. C. 560; 2 East, P. C. 514. It was at one time doubted, whether it was not essential that the felony intended to be committed should be a felony at common law. 1 Hale, P. C. 562; Crompton, 32; Dalt. s. 151, c. 5. But it appears to be now settled, according to the modern authorities, that it makes no difference whether the offence intended be felony at common law or by statute; and the reason given is, that whenever a statute makes an offence felony, it incidentally gives it all the properties of a felony at common law. Hawk. P. C. b. 1, c. 38, s. 38; R. v. Gray, Str. 481; 4 Bl. Com. 228; 2 East, P. C. 511; 2 Russ. Cri. 40, 5th ed. If it appear that the intent of the party in breaking and entering was merely to commit a trespass, it is no burglary, as where the prisoner enters with intent to beat some person in the house, even though killing or murder may be the consequence, yet, if the primary intention was not to kill, it is still not burglary. 1 Hale, P. C. 561; 2 East, P. C. 509.² Where a servant embezzled money entrusted to his care, ten guineas of which he deposited in his trunk, and quitted his master's service, but afterwards returned, broke and entered the house in the night, and took away the ten guineas, this was adjudged no burglary, for he did not enter to com-

¹ An indictment for burglary need not allege the want of the owner's consent. Sullivan v. State, 13 Tex. App. 462: Overruling Brown v. State, 7 Tex. App. 619. Evidence of preparations by defendant to commit a robbery on the owner of the house are admissible to show the intent in making the entry. State v. Cowell, 12 Nev. 337.

² The offence intended to be committed must be a felony. Evidence of an intent to commit a misdemeanor will not sustain an indictment for burglary. Wood v. State, 18 Fla. 967. An intent to steal or to commit some felony is an essential element of burglary, but where there is an averment of a completed larceny, or of some felony actually committed it is unnecessary to aver the felonious intent. Barber v. State, 78 Ala. 19. In an indictment for burglary, the intent to commit a felony will be presumed from the entrance. State v. Teeter, 8 Crim. Law Mag. 58.

mit a felony, but a trespass only. Although it was the master's money *in right*, it was the servant's *in possession*, and the original act was no felony. *R. v. Bingley*, Hawk. P. C. b. 1, c. 38, s. 37, cited 2 Leach, 841, as *R. v. Dingley*; 2 East, P. C. 510, s. c. as Anon. Where goods had been seized as contraband by an excise officer, and his house was entered in the night, and the goods taken away, upon an indictment for entering his house, with intent to steal his goods, the jury found that the prisoners broke and entered the house with intent to take the goods on behalf of the person who had smuggled them; and, upon a case reserved, all the judges were of opinion, that the indictment was not supported, there being no intent to steal, however outrageous the conduct of the prisoners was in thus endeavoring to get back the goods. *R. v. Knight & Roffey*, 2 East, P. C. 510. If the indictment had been for breaking and entering the house, with intent feloniously to rescue goods seized, that being made a felony by statute 19 Geo. 2, c. 34 (repealed), the chief baron and some of the other judges held it would have been burglary. But even in that case some evidence must be given, on the part of the prosecutor, to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid; but their being found in oil-cases, or in great quantities in an unentered place, would have been sufficient for this purpose. 2 East, P. C. 510. The prisoner was indicted for breaking, etc., with intent to kill and destroy a gelding there being. It appeared that the prisoner, in order to prevent the horse from running a race, cut the sinews of his fore legs, from which he died. Pratt, C. J., directed an acquittal, the intent being not to commit felony by killing and destroying the horse, but a trespass only to prevent his running, and therefore it was no burglary. But the prisoner was afterwards indicted for killing the horse, and capitally convicted. *R. v. Dobb*, 2 East, P. C. 513. Two poachers went to the house of a gamekeeper, who had taken a dog from them, and believing him to be out of the way, broke the door and entered. Being indicted for this as a burglary, and it appearing that their intention was to rescue the dog, and not to commit a felony, Vaughan, *B., directed an acquittal. Anon., Matth. Dig. C. L. 48. See *384] *R. v. Holloway*, 5 C. & P. 524, 24 E. C. L.

Proof of the intent—variance in the statement of. The intent must be proved as laid. If it is laid that the intent was to commit one sort of felony, and it is proved that the intent was to commit another, it is a fatal variance. 2 East, P. C. 514. Where the prisoner was indicted for burglary and stealing goods, and it appeared that there were no goods stolen, but only an intent to steal, it was held by Holt, C. J., that this ought to have been so laid, and he directed an acquittal. *R. v. Vandercomb*, 2 East, P. C. 514. The property in the goods which it is alleged were intended to be stolen, must be correctly laid. 2 Russ. Cri. 41, 5th ed. But see now 14 & 15 Vict. c. 100, s. 1, *ante*, p. 209. An indictment for burglary charged the prisoner with breaking in the night-time, into the dwelling-house

of E. B., with intent the goods and chattels in the same dwelling-house then and there being feloniously and burglariously to steal, and stealing the goods of E. B. It was proved that it was the house of E. B., but that the goods the prisoner stole were the joint property of E. B. and two others. It was held that if it was proved that the prisoner broke into the house of E. B. with intent to steal the goods there generally, that would be sufficient to sustain the charge of burglary contained in the indictment, without proof of an intent to steal the goods of the particular person whose goods the indictment charged that he did steal. *R. v. Clarke*, 1 C. & K. 431, 47 E. C. L. A. was charged with breaking into the house of K. and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but that he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it; it was held that M. was a bailee, and that the goods in the shop might properly be laid as his property. *R. v. Bird*, 9 C. & P. 44, 38 E. C. L.

It seems sufficient in all cases where a felony has been actually committed, to allege the commission without any intent; 1 Hale, P. C. 560; 2 East, P. C. 514; and in such case no evidence, except that of the committing of the offence, will be required to show the intention. It is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. Yet this, it seems, must be confined to cases where the offence intended is in itself a felony.¹ 2 East, P. C. 514, 515.

The intent of the parties will be gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front and at the back. They put a crow-bar and knife through a window, but the owner resisting them, they went away. Being indicted for burglary with intent to commit a larceny, it was contended that there was no evidence of the intent; but Park, J., said, that it was for the jury to say, whether the prisoner went with the intent alleged or not; that persons do not in general go to houses to commit trespasses in the middle of the night; that it was matter of observation that they had the opportunity, but did not commit the *larceny, and he left it to the jury to say, whether, from all [*385 the circumstances, they could infer that or any other intent. *Anon.*, 1 Lewin, C. C. 37.²

¹ *Commonwealth v. Chilson*, 2 Cush. 15. In burglary the intent to steal is sufficient, it is not necessary that goods should be actually taken. *Olive v. State*, 5 Bush, 376. S.

It is not necessary to aver specifically the goods intended to be stolen, nor the owner thereof. *Jones v. State*, 18 Fla. 889.

² The recent possession of goods stolen at a burglary is evidence for the jury, although the indictment contained no allegation that such goods were stolen. Com-

Minor offence—larceny. If the prosecutor fail in his attempt to prove the breaking and entry of the dwelling-house, but the indictment charges the prisoner with a larceny committed there, he may be convicted of the larceny, simple or compound, according to the circumstances of the case. Thus, where the prisoner was charged with breaking and entering the house of the prosecutor, and stealing 60*l.* therein, and the jury found that he was not guilty of breaking and entering the house in the night, but that he was guilty of stealing the money in the dwelling-house; upon a case reserved, it was resolved by the judges, after some doubt, that by this finding the prisoner was ousted of his clergy, for the indictment contained every charge necessary upon the statute, 12 Ann. c. 7 (repealed), viz., a stealing in the dwelling-house to the amount of 40*s.*, and the jury had found him guilty of that charge. *R. v. Withal*, 2 East, P. C. 517; 1 Leach, 88. In a similar case the verdict given by the jury was, "not guilty of burglary, but guilty of stealing above the value of 40*s.* in the dwelling-house," and the entry made by the officer was in the same words. On a case reserved, the judges held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do so according to the plain sense and meaning of the jury, which admitted of no doubt; and that the minute was only for the future direction of the officer, and to show that the jury found the prisoner guilty of the larceny only. But many of the judges said, that when it occurred to them they should direct the verdict to be entered, "not guilty of the breaking and entering in the night, but guilty of the stealing," etc., as that was more distinct and correct. It appeared, upon inquiry, to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict "not guilty of murder, but guilty of manslaughter," or, "not guilty of murder, but guilty of feloniously killing and slaying," and yet murder includes the killing. The judges added that the whole verdict must be taken together, and that the jury must not be made to say that the prisoner is not guilty generally, where they find him expressly guilty of part of the charge, or to appear to speak contradictory by means of the officers using a technical term, when the verdict is sensible and intelligent in itself. *R. v. Hungerford*, 2 East, P. C. 518.¹

monwealth v. McGorty, 114 Mass. 299. But the presumption arising therefrom is not sufficient to warrant a conviction. *State v. Shaffer*, 59 Iowa, 290. See generally *Houser v. State*, 58 Ga. 78; *Walker v. Commonwealth*, 28 Gratt. (Va.) 969; *Prince v. State*, 44 Texas, 480; *People v. Gordon*, 40 Mich. 716. A burglary must be proved before evidence of the possession of goods is admissible in evidence. *Fuller v. State*, 48 Ala. 273.

¹ On an indictment for breaking and entering a dwelling-house with intent to steal, the defendant cannot be convicted of larceny. *Fisher v. State*, 46 Ala. 717. S. But a count for larceny does not vitiate an indictment for burglary. *Barber v. State*, 78 Ala. 19.

Under the Missouri statute, which permits prosecution for both burglary and larceny in the same count, there is no necessity to caution the jury as to the character of the breaking. *State v. Butterfield*, 75 Mo. 297. An information charging burglary, with-

It was formerly thought, that if several were jointly indicted for burglary and larceny, and no breaking and entering were proved against one, he could not be convicted of larceny and the others of burglary. *R. v. Turner*, 1 Sid. 171; 2 East, P. C. 519. But in a later case, where one prisoner pleaded guilty, and the other two were found guilty of the larceny only, the judges, on a case reserved, differed in opinion. Seven of them resolved that judgment should be entered against all the three prisoners, against him who had pleaded guilty for the burglary and capital larceny, and against the other two for the capital larceny. Burrough, J., and Hullock, B., were of a different opinion, but Hullock thought that if a *nolle prosequi* were entered as to the burglary, judgment might be given against all the three for the capital larceny. The seven judges thought that there *might be cases in which, upon a joint larceny by several, the [*386 offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking. *R. v. Butterworth*, Russ. & Ry. 520.

Although the prisoner may be convicted of the larceny only, yet if the larceny was committed on a previous day, and not on the day of the supposed burglary, he cannot be convicted of such larceny. This point having been reserved for the opinion of the judges, they said: "The indictment charges the prisoner with burglariously breaking and entering the house *and* stealing the goods, and most unquestionably that charge may be modified by showing that they stole the goods without breaking open the door; but the charge now proposed to be introduced goes to connect the prisoners with an antecedent felony committed before *three* o'clock, at which time, it is clear, they had not entered the house. Having tried without effect to convict them of breaking and entering the house, and stealing the goods, you must admit that they neither broke the house nor stole the goods on the day mentioned in the indictment; but to introduce the proposed charge, it is said, that they stole the goods on a former day, and that their being found in the house is evidence of it. But this is surely a distinct transaction; and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present." *R. v. Vandercomb*, 2 Leach, 708.

Proof of breaking out of a dwelling-house. It was formerly doubted whether, where a man entered a dwelling-house in the night (without breaking) with the intent to commit felony, and afterwards broke out of the same, or being there in the night committed a felony, and broke out, this amounted to burglary or not.¹ 1 Hale,

out specifying the degree, charges both degrees and a verdict for either is proper. *People v. Barnhart*, 59 Cal. 381.

¹That it does, see case of *Sands et al.*, 6 Bog. Rec. 1. S. *State v. Ward*, 48 Conn. 489.

P. C. 554; *R. v. Clarke*, 2 East, P. C. 490; Lord Bac. Elem. 65; 2 Russ. Cri. 7, 5th ed. It was, however, declared to be such by the repealed statute 12 Anne, c. 7, and the provision has been repeated in the subsequent acts. See *supra*, p. 359.

An indictment which stated in one count that the prisoner "did break to get out," and in another that he "did break *and* get out," was held by Vaughan and Patteson, JJ., insufficient since the last mentioned statute, which uses the words "break out." *R. v. Crompton*, 7 C. & P. 139, 32 E. C. L.

Where a lodger in the prosecutor's house, got up in the night and unbolted the back-door, and went away with a jacket of the prosecutor's which he had stolen, he was convicted of burglary. In this case it was also held to be not the less a burglary because the defendant was *lawfully* in the house as a lodger or as a guest at an inn. *R. v. Wheldon*, 8 C. & P. 747, 34 E. C. L.

Proof upon plea of *autrefois acquit*. In considering the evidence upon the plea of *autrefois acquit* in burglary, some difficulty occurs from the complex nature of that offence, and from some contrariety in the decisions. The correct rule appears to be, that an acquittal upon an indictment for burglary in breaking and entering and *stealing goods*, cannot be pleaded in bar to an indictment for burglary in the same dwelling-house, and on the same night, *with intent to steal*, on *387] the ground that the several offences described in the two indictments cannot be said to be the same. This rule was established in *R. v. Vandercomb*, where Buller, J., delivered the resolution of the judges, and after referring to 2 Hawk. P. C. c. 35, s. 3; *Fost.* 361, 362; *R. v. Pedley*, 1 Leach, 242, concluded in these words: "These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now to apply these principles to the present case. The first indictment was for burglariously breaking and entering the house of Miss Neville, and *stealing* the goods mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for in fact no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of Miss Neville *with intent to steal*, which is the charge in the present indictment, and therefore they have never been in jeopardy for this offence. For this reason the judges are all of opinion that the plea is bad, and that the prisoners must take their trials upon the present indictment." *R. v. Vandercomb*, 2 Leach, 716; 2 East, P. C. 519; overruling *R. v. Turner*, Kel. 30, and *R. v. Jones and Bever*, Id. 52. See also the learned dissertation on the subject of *autrefois acquit* in 1 Russ. on Cri. 5th ed. 38. Where a prisoner was indicted for a simple burglary in the house of a person, for whose murder he had been acquitted, Parke, B., told the jury that the charge in the indictment did not affect the life of the prisoner, as there was not an allegation that

the burglary was accompanied by violence; and that if he had been indicted for burglary with violence, since he might have been convicted of manslaughter, or even assault, on the indictment for murder, on which he had been acquitted altogether, in his opinion, that acquittal would have been an answer to the allegation of violence, if it had been inserted in the present indictment. *R. v. Gould*, 9 C. & P. 364, 38 E. C. L.

Indictment for being found by night armed with intent to break into any house, etc. Where persons are charged under s. 58 of the 24 & 25 Vict. c. 96, with being found by night armed with an offensive weapon with intent to break and enter into a building, the particular building must be specified in the indictment, and proof must be given of the intent to break and enter such building, and it is the safer course to charge and prove an intent to commit a specific felony. *R. v. Jarrald*, L. & C. 301; and see *infra*.

Nature of offence of having possession of implements of house-breaking. This offence consists in the possession merely without lawful excuse of the implements mentioned. It is not necessary to allege or to prove at the trial an intent to commit a felony. *R. v. Bailey*, 1 Dears. C. C. R. 244; 23 L. J., M. C. 13. Where only one is in possession of the implements, the possession by him is possession by all. *R. v. Thompson*, 11 Cox, C. C. 362 (C. C. R.).

If a man is found with an implement of housebreaking in his possession, a general burglarious intent is sufficient to constitute an offence against the second clause of the 58th section; but if he is armed with any other weapon, there must be proof of an intent to break into some particular house in order to constitute an offence *against the first branch of the 58th section. *R. v. Jarrald*, [*388 *per* Crompton, J., 1 L. & C. 306.

What are implements of housebreaking. Keys are implements of housebreaking; for though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking, and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, and with the intention of using them as implements of housebreaking. *R. v. Oldham*, 2 Den. C. C. R. 472; 21 L. J., M. C. 134.

The error suggested by Maule, J., in this case, as occurring in the 14 & 15 Vict. c. 19, s. 1 (repealed by 24 & 25 Vict. c. 95), namely, the omission of a comma between the words "pick-lock" and "key" is not corrected in the present act, 24 & 25 Vict. c. 96, s. 58, *supra*, p. 359. If this was intentional, then there are no special words which make ordinary keys implements of housebreaking.

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*CATTLE AND OTHER ANIMALS.

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Stealing horses, cows, sheep, etc. By the 24 & 25 Vict. c. 96, s. 10 (replacing s. 25 of the 7 & 8 Geo. 4, c. 29), "whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor. and with or without solitary confinement."

Killing animals with intent to steal the carcase, etc. By s. 11, "whosoever shall wilfully kill any animal with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony."

Killing or maiming cattle. By the 24 & 25 Vict. c. 97, s. 40, "whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall be guilty of felony and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Malice against owner unnecessary. See 24 & 25 Vict. c. 97, s. 58, *supra*, p. 289.

Injury by person having animals in his possession. See s. 59, *supra*, p. 289.

Proof of the animal being within the statute. The word *cattle*, in the 24 & 25 Vict. c. 97, s. 40, would, doubtless, receive the same interpretation as it bore in the repealed statute 9 Geo. 1, c. 22, upon *which it was held that an indictment for killing a "mare was good. *R. v. Paty*, 1 Leach, 72; 2 W. Bl. 721; 2 East, P. C. [*390 1074. And see *R. v. Tivey*, *post*, p. 391. And so an indictment for wounding a "gelding" has been held good. *R. v. Mott*, 1 Leach, 73 (n). Pigs were held to be within the 9 Geo. 1, c. 22. *R. v. Chapple*, Russ. & Ry. 77. So also asses, *R. v. Whitney*, 1 Moody, C. C. 3. It is not sufficient in the indictment to charge the prisoner with maiming, etc., "cattle" generally, without specifying the description. *R. v. Chalkley*, Russ. & Ry. 258. Where the prisoner was indicted under the repealed statute 7 & 8 Geo. 4, c. 29, s. 25, for stealing a sheep, and the jury found that it was a lamb; the majority of the judges present, on a case reserved (six to five), held the conviction to be right. *R. v. Spicer*, 1 Den. C. C. 82; 1 C. & K. 699, 47 E. C. L.

And now upon any similar objection being taken, the indictment would be amended under 14 & 15 Vict. c. 100, s. 1, *ante*, p. 209.

Proof of the injury. Upon an indictment for maliciously *wounding*, it need not appear either that the animal was killed, or that the wound inflicted a permanent injury. Upon an indictment for this offence, it was proved that the prisoner had maliciously driven a nail into a horse's foot. The horse was thereby rendered useless to the owner, and continued so to the time of the trial; but the prosecutor stated that it was likely to be perfectly sound again in a short time. The prisoner being convicted, the judges, on a case reserved, held the conviction right, being of opinion that the word "wounding" did not imply a permanent injury. *R. v. Haywood*, Russ. & Ry. 16; 2 East, P. C. 1076. But by *maiming* is to be understood a permanent injury. *Id.* 2 East, P. C. 1077; *R. v. Jeans*, 1 C. & K. 539, 47 E. C. L. Where the prisoner was indicted under the repealed statute 4 Geo. 4, c. 54, for wounding a sheep, and it appeared that he had set a dog at the animal, and that the dog, by biting it, inflicted several severe wounds, Park, J., is stated to have said, "This is not an offence at common law, and is only made so by a statute; and I am of opinion that injuring a sheep, by setting a dog to worry it, is not a maiming or wounding within the meaning of that statute." *R. v. Hughes*, 2 C. & P. 420, 12 E. C. L. The word wound, in section 40, is to be construed according to its ordinary meaning; and injuries to a horse's tongue, apparently caused by a pull of the hand, were held to be a "wounding." *Reg. v. Bullock*, 37 L. J., M. C. 47; L. R. 1 C. C. R. 115. As to the construction of the word "wound," see *infra*, "Attempt to commit Murder." The prisoner poured a quantity of nitrous acid into the ear of a mare, some of which getting into the eye produced immediate blindness; he was convicted of maliciously maiming the mare, and the conviction was held by the judges to be right. *R. v. Owen*, 1 Moody, C. C. 205. The administering of poison to cattle, however malicious the

act may be, is not a felony within the statute, unless the animal die; but the party may be indicted as for a misdemeanor. Where a man was thus indicted for administering sulphuric acid to eight horses, with intent feloniously to kill them, and it appeared that he had mixed sulphuric acid with the corn, and having done so gave each horse his feed; Park, J., held that this evidence supported the allegation in the indictment of a joint administering to all the horses. *R. v. Mogg*, 4 C. & P. 364, 19 E. C. L. Where the prisoner set fire to a cowhouse, and a cow in it was burned to death, Taunton, J., ruled *391] that this was a killing of the cow within the repealed statute 7 & 8 Geo. 4, c. 30, s. 16. *R. v. Haughton*, 5 C. & P. 559, 24 E. C. L.

Proof of malice and intent. Under the repealed statute of 9 Geo. 1, c. 22, it was necessary to show that the act was done out of malice to the owner; but the 7 & 8 Geo. 4, c. 30, s. 25, renders it an offence, whether the act be done from malice conceived against the owner or otherwise, and the same provision is contained in the 24 & 25 Vict. c. 97, s. 58, *supra*, p. 289. See 2 Russ. Cri. 930, 5th ed.

On an indictment under the statute 7 & 8 Geo. 4, c. 30, s. 16 (repealed), for maliciously wounding a mare, where no malice was shown towards any one, and it did not appear that the prisoner knew to whom the mare belonged, or had any knowledge of the prosecutor, it was contended that since the statute 7 Will. 4 & 1 Vict. c. 90, s. 2 (repealed), no punishment could be enforced under the 7 & 8 Geo. 4, c. 30, s. 16, and, consequently, that the 25th section of that Act had no operation, and, therefore, that proof of malice was necessary. Patterson, J., held that it was not; and the prisoner being convicted, the judges were of opinion that the conviction was right. *R. v. Tivey*, 1 Denison, C. C. 63; 1 C. & K. 704, 47 E. C. L.

Although it is thus rendered unnecessary to give evidence of malice against any particular person, yet an evil intent in the prisoner must appear. Thus, in *R. v. Mogg*, *supra*, Park, J., left it to the jury to say whether the prisoner had administered the sulphuric acid (there being some evidence of a practice of that kind by grooms) with the intent imputed in the indictment, or whether he had done it under the impression that it would improve the appearance of his horses; and that in the latter case they ought to acquit him. In the same case the learned judge allowed evidence to be given of other acts of administering, to show the intent. And where the prisoner caused the death of a mare by inserting the handle of a fork into her vagina, and pushing it into her body, it was held there was sufficient malice to support an indictment under s. 40, though there was no evidence that the prisoner was actuated by ill-will towards the owner or spite towards the mare or by any motive except the gratification of his own depraved mind. The jury found that the prisoner did not in fact intend to maim, wound or kill the mare, but that knowing what he was doing would or might have that effect, he nevertheless did what he did recklessly and not caring whether the mare was in-

jured or not. *R. v. Welch*, 1 Q. B. D. 23 ; 45 L. J., M. C. 17. See *ante*, p. 24.

Offences under the Cruelty to Animals Act (39 & 40 Vict. c. 77, passed in order to regulate vivisection) may, where the penalty which can be imposed exceeds five pounds, be prosecuted on indictment at the request of the party accused.

Drugging animals is an offence punishable on summary conviction under 39 Vict. c. 13.

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*CHALLENGING TO FIGHT.

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What amounts to. It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to provoke another to send such a challenge, or to fight, *e. g.*, by dispersing letters to that purpose, containing reflections and insinuating a desire to fight. Hawk. P. C. b. 1, c. 63, s. 3. Thus a letter containing these words, "You have behaved to me like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make," was held indictable. *R. v. Phillips*, 6 East, 464; *R. v. Rice*, 3 East, 581. No provocation, however great, is a justification on the part of the defendant, although it may weigh with the court in awarding the punishment. *Id.*

On an indictment for challenging, or provoking to challenge, the prosecutor must prove—1st, the letter or words conveying the challenge; and 2nd, where it does not appear from the writing or words themselves, he must prove the intent of the party to challenge, or to provoke to a challenge.

Proof of the intent. In general the intent of the party will appear from the writing or words themselves; but where that is not the case, as where the words are ambiguous, the prosecutor must show the circumstances under which they were uttered, for the purpose of proving the unlawful intent of the speaker. Thus words of provocation, as "liar," or "knave," though a *mediate* provocation to a breach of the peace, do not tend to it *immediately*, like a challenge to fight, or a threatening to beat another. *R. v. King*, 4 Inst. 181. Yet these, or any other words, would be indictable if proved to have been spoken with an intent to urge the party to send a challenge.¹ 1 Russ. Cri. 397, 5th ed.

¹ A challenge to fight a duel out of the State is indictable, for its tendency is to produce a breach of the peace. *State v. Farrier*, 1 Hawks, 487; *State v. Taylor*, 1 Const. Rep. 107. The declarations of the second are admissible against the principal. *State v. Dupont*, 2 McC. 334. It is a question for the jury whether the party intended the challenge or not. *Gibbon's Case*, 1 South. 40; *Commonwealth v. Levy*, 3 Wheel. C. C. 245; *Wood's Case*, 3 Rog. Rec. 133. Parol testimony is admissible in explanation of the note. *Commonwealth v. Hart*, 6 J. J. Marsh. 120. Expressing a readiness to accept a challenge does not amount to one. *Commonwealth v. Tibbs*, 1 Dana, 524. Words insinuating a desire to fight with deadly weapons, as they tend to provoke such a combat, may amount to a misdemeanor at common law. *Id.* 524. Threats

Venue. Where a letter challenging to fight is put into the post-office in one county, and delivered to the party in another, the venue may be laid in the former county. If the letter is never delivered, the defendant's offence is the same. *R. v. Williams*, 2 Camp. 506.

of great bodily harm, accompanied by acts showing a formed intention to put them in execution, if intended to put the person threatened in fear of their execution, and if they have that effect, and are calculated to produce that effect upon a person of ordinary firmness, constitute a breach of the public peace, which is punishable by indictment. *State v. Benedict*, 11 Vt. 236. S.

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*CHEATING.

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Nature of cheats indictable at common law. The question, whether or no a fraudulent transaction is indictable, as a cheat at common law, has become of less importance than it formerly was, because several cheats are now indictable by various statutes, especially by the 24 & 25 Vict. c. 96, ss. 88, *et seq.* (replacing the 7 & 8 Geo. 4, c. 29, s. 53), which include all that class of offences known as obtaining money and goods by *false pretences*.

The subjects of cheats at common law is very fully considered in 2 Russ. Cri. b. iv. c. 32, s. 1. The line is there very carefully drawn between such cheats and frauds as are of a public nature, and such as do not affect the public; and it is also strongly insisted on that the definition of a cheat indictable at common law must include the term, that it is one *which affects, or may affect, the public*.¹ The following are the more important frauds at common law.

Cheats affecting public justice. All cheats which are levelled against the public justice of the kingdom are indictable at common law. 2 East, P. C. 821. Many such cheats, however, come under the head of the offence of "False Personation," which will be separately considered. As to using false county court process, see 9 & 10 Vict. c. 95, s. 57, *infra*, tit. "Forgery."

Selling unwholesome provisions. The selling unwholesome provisions, 4 Bl. Com. 162, or the giving any person unwholesome victuals, not fit for man to eat, *lucri causa*, 2 East, P. C. 822, is an indictable offence. Where the defendant was indicted for deceitfully providing certain French prisoners with unwholesome bread, to the injury of their health, it was objected in arrest of judgment, that the indictment could not be sustained, for it did not appear that what was done was in breach of any contract with the public, or of any civil or moral duty; but the judges, on a reference to them, held the conviction right. *R. v. Treeves*, 2 East, P. C. 821. The defendant was indicted for supplying the royal military asylum at Chelsea

¹ *Resp. v. Teischer*, 1 Dall. 338; *Commonwealth v. Eckert*, 2 Bro. 251; *Resp. v. Powell*, 1 Dall. 47. S.

with loaves not fit for the food of man, which he well knew, etc. It appears that many of the loaves were strongly impregnated with alum (prohibited to be used by repealed statute 37 Geo. 3, c. 98, *s. 21), and pieces as large as horse-beans were found; the defence was, that it was merely used to assist the operation of the yeast, and had been carefully employed. But Lord Ellenborough said, "Who ever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm." *R. v. Dixon*, 4 Camp. 12; 3 M. & S. 11. [*394]

False accounting, etc., by public officers. Fraudulent malversations or cheats by public officers, are also the subject of an indictment at common law: thus, overseers of the poor are indictable for refusing to account;¹ *R. v. Comming*, 5 Mod. 179; 1 Bott. 232; 2 Russ. Cr. 514, 5th ed.; or for rendering false accounts. *R. v. Martin*, 2 Campb. 269; 3 Chitty, C. L. 701; 2 Russ. Cri. 514, 5th ed. Upon an application to the court of King's Bench, against the minister and churchwardens of a parish, for misapplying moneys collected by a brief, and returning a smaller sum only as collected, the court, refusing the information, referred the prosecutors to the ordinary remedy by indictment. *R. v. Ministers, etc., of St. Botolph*, 1 W. Bl. 443. *Vide post*, tit. "Officers."

Again, where two persons were indicted for enabling persons to pass their accounts with the pay-office, in such way as to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the court decided otherwise, as it related to the public revenue. *R. v. Bembridge*, cited 6 East, 136.

False weights and measures. Another class of frauds affecting the public, is cheating by false weights and measures, which carry with them the semblance of public authenticity.

It has never been doubted that selling by false weights and measures is at common law an indictable offence, though selling a less quantity than is pretended is not so. *Per Buller, J., R. v. Young*, 3 T. R. 304; 2 Russ. Cri. 5th ed. Thus, if a person has measured corn in a bushel, and put something in the bushel to fill it up, or has measured it in a bushel short of the stated measure, he is indictable. *R. v. Pinkney*, 2 East, P. C. 820. See *R. v. Wheatley, infra*, p. 396.

Cheating with cards, dice, etc. This was considered an indictable offence at common law, but it is now regulated by the 8 & 9 Vict. c. 109, s. 17, which provides that "every person, who shall by any fraud or unlawful device, or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or

¹ *Resp. v. Powell*, 1 Dall. 47; *Commonwealth v. Wade*, 1 Whart. Dig. 347.

exercise, win from any person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly."

Tossing with coins was held by the C. C. R. to be a pastime or exercise if not a game within the meaning of this section. *R. v. O'Connor*, 15 Cox, C. C. R. 3. When it was stated in the indictment that the defendant *won* certain moneys from one H. F. B., but did not say to whom the money belonged, the indictment was held good, *395] *because it followed the words of the statute. *R. v. Moss*, Dears. & B. C. C. 104. A doubt was also raised in that case, whether the offence was not completed by *winning*, even if the money was not *obtained*.

Using false tokens. The using of false tokens is a cheat at common law. The question was much considered in *R. v. Closs*, Dears. & B. C. C. 460; 27 L. J., M. C. 541. There the prisoner was indicted for keeping, and exposing for sale, and for selling to one H. A. F. a picture, upon which he had unlawfully painted the signature of J. L., intending thereby to denote that the picture was an original picture by J. L. This was held, on a motion in arrest of judgment, to be a fraud at common law. Cockburn, C. J., said, in delivering the judgment of the Court of Criminal Appeal, "we have carefully examined the authorities, and the result is, that we think, if a person, in the course of his trade openly and publicly carried on, puts a false mark or token upon an article so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article is sold, and money obtained by means of that false mark or token, that is a cheat at common law." But the indictment was held bad for not alleging with sufficient clearness that it was *by means* of such false tokens that the defendant was able to pass off the picture as genuine, and obtained the money.

What cheats are not indictable. The following cheats have been held not to be indictable at common law; though many of them would now be so by statute. Most of these decisions are considered as resting on the ground that the cheats to which they relate are not of a public nature.

Where an imposition upon an individual is effected by a false affirmation or bare lie, in a matter not affecting the public, an indictment is not sustainable.¹ Thus, where an indictment charged the defendants with selling to a person eight hundredweight of gum, at the price of seven pounds per hundredweight, falsely affirming that the gum was

¹ *Commonwealth v. Warren*, 6 Mass. 72. But when a man induces another, by false representations and false reading, to sign his name to a note for a different amount than that agreed upon, it has been held to be a cheat, for which he may be indicted. *Hill v. State*, 1 Yerg. 76. The offence of cheating, when the subject-matter is land and the title to it, is not indictable at common law. *Commonwealth v. Woodrum*, 4 Clark, 207. S.

gum *seneca*, and that it was worth seven pounds per hundredweight, whereas it was not gum *seneca*, and was not worth more than three pounds, etc., the indictment was quashed. *R. v. Lewis, Sayer*, 205.

So where the party accompanies his assertion with an apparent token of *no more value than his own assertion*. Thus, where an indictment at common law charged that Lara, deceitfully intending, by crafty means and devices, to obtain possession of divers lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order for payment of money subscribed by him (Lara), etc., purporting to be a draft upon his banker for the amount, which he knew he had no authority to do, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid, by virtue of which he obtained the tickets, and defrauded the prosecutor of the value; judgment was arrested, on the ground that the defendant was not charged with having used any false token to accomplish the deceit, for the banker's check drawn by himself entitled him to no more credit than his bare assertion that the money would be paid. *R. v. Lara*, 2 East, P. C. 819; 6 T. R. 565; 2 Leach, 652. But such an offence is punishable, as a *false pretence* under the statute. *Vide post*, *title "False Pretences." So where the defendant, a brewer, [*396 was indicted for sending to a publican so many vessels of ale, marked as containing such a measure, and writing a letter, assuring him that they did contain such a measure, when in fact they did not contain such a measure, but so much less, etc., the indictment was quashed on motion, as containing no criminal charge. *R. v. Wilder*, cited 2 Burr. 1128; 2 East, P. C. 819. Upon the same principle, where a miller was indicted for detaining corn sent to him to be ground, the indictment was quashed, it being merely a private injury, for which an action would lie. *R. v. Channell*, 2 Str. 793; 1 Sess. Ca. 366; 2 East, P. C. 118. So selling sixteen gallons of ale as eighteen; Lord Mansfield said, "It amounts only to an unfair dealing, and no imposition upon this particular man, from which he could not have suffered but for his own carelessness in not measuring the liquor when he received it; whereas fraud, to be the object of a criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights and measures, false tokens, or where there is a conspiracy." *R. v. Wheatley*, 2 Burr. 1125; 1 W. Bl. 273; 2 East, P. C. 818. Where a miller was charged with receiving good barley, and delivering meal in return different from the produce of the barley, and musty, etc., this was held not to be an indictable offence. Lord Ellenborough said, that if the case had been, that the miller had been owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that he, abusing the confidence of his situation, had made it a color for practising a fraud, this might have presented a different aspect; but as it then stood, it seemed to be no more than the case of a common tradesman, who was guilty of a fraud in a matter of trade or dealing,

such as was adverted to in *R. v. Wheatley* (*supra*), and the other cases, as not being indictable.¹ *R. v. Hayne*, 4 M. & S. 214; *vide R. v. Wood*, 1 Sess. Ca. 217; 2 Russ. Cri. 523 (*n*), 5th ed. A baker had contracted with the guardians of a parish to deliver loaves of a certain weight to the poor people. The relieving officer gave the poor people tickets, which they were to take to the baker. He was to give them loaves on their presenting their tickets to him, and afterwards to return the tickets, as his vouchers, once a week, with a statement of the amount of the loaves, to the relieving officer, who would give him credit in his account for the amount. The baker was to be paid by the guardians some months later; and by a clause in the contract, the guardians had the power, in case of a breach of contract by the baker, of deducting any damages caused by such breach from the amount to be ultimately paid. The baker supplied the poor people who presented tickets, with loaves short of the contract weight. It was held, that this was a mere private fraud, and not a fraud indictable at common law. *R. v. Eagleton*, 24 L. J., M. C. 158. Dears. C. C. 515. The prisoner was, however, convicted of attempting to obtain money by false pretences. See that title, *post*.

The indictment stated that the defendant came to M. in the name of J., to borrow 5*l*., on which M. lent her the 5*l*., *ubi re verè* she never had any authority from J. to borrow the money. The defendant being convicted, on motion in arrest of judgment, the whole court thought this not an indictable offence. Holt, C. J., put the following case: A young man, seemingly of age, came to a tradesman to buy some commodities, who asked him if he was of age, and he told him *397] *he was, upon which he let him have the goods, and upon an action he pleaded *infra ætatem*, and was found to be under age half a year; and afterwards the tradesman brought an action upon the case against him for a cheat; but, after a verdict for the plaintiff, judgment was arrested. Powell, J., said, "If a woman, pretending herself to be with child, does with others conspire to get money, and for that purpose goes to several young men, and says to each that she is with child by him, and that, if he will not give her so much money, she will lay the bastard to him, and by these means gets money of them, this is indictable." Holt, C. J., added, "I agree it is so when she goes to several, but not to one particular person." *R. v. Glanvill*, Holt, 354. From the last observation of Holt, C. J., it appears that Powell, J., was speaking of an indictment for *cheating*, and not, as might be supposed, from using the words "does with others conspire," of an indictment for conspiracy.

¹ *People v. Babcock*, 7 Johns. 201; *Commonwealth v. Warren*, 6 Mass. 72; *People v. Stone*, 9 Wend. 182; *State v. Stroll*, 1 Rich. 244. S.

*CHILD—ABANDONMENT OF.

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Abandoning or exposing children. The ill-treatment of children by persons who are their parents or guardians has frequently been the subject of criminal prosecution, and in many cases without success.

In some cases it has been attempted to make the abandonment itself the ground of a criminal prosecution, but it is now definitely settled that abandonment alone, without proof that the child's health was thereby injured, is not sufficient. *R. v. Friend*, Russ. & Ry. 20; *R. v. Cooper*, 1 Den. C. C. 454; *R. v. Hogan*, 2 Den. C. C. 277; 20 L. J., M. C. 219; *R. v. Phillpot*, Dears. C. C. 179. From what was said by Jervis, C. J., in delivering judgment in the last case, it appears also that the injury must be such as permanently to affect the health of the child, in analogy to the provision of the 14 & 15 Vict. c. 11, s. 1 (24 & 25 Vict. c. 100, s. 26).

These cases, however, assume that if the child's health were permanently injured the parent or guardian would be guilty of a misdemeanor.

The law on the subject is now contained in the 24 & 25 Vict. c. 100, s. 27, which provides that, "Whosoever shall unlawfully abandon or expose any child being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Where the mother left the child at the door of its father's house to his knowledge, and he left it there, this was held an "abandonment" by the father. *R. v. White*, L. R. 1 C. C. R. 311; 40 L. J., M. C. 135.

Where the child was packed up in a hamper, labelled "with care," and directed to the lodgings of the father, and the parcel was delivered in less than an hour, it was held that the life of the child was "endangered." *R. v. Falkingham*, L. R. 1 C. C. R. 122; 39 L. J., M. C. 47.

Neglecting children.¹ The point whether a person is indictable

¹ The course of procedure under the statutes in the several States, in cases of bastardy, is of a civil character, rather than criminal, the object being to determine the paternity, so as to fix the liability for the support of the child, and relieve the community from this burden. Requisites of the allegation under bastardy act. Andrew

for abandoning a child of tender years, so that such child thereby becomes chargeable to a parish, has been brought before the court of criminal appeal in two cases; *R. v. Cooper*, 1 Den. C. C. R. 459; 18 L. J., M. C. 168, and *R. v. Hogan*, 2 Den. C. C. R. 277; 26 L. J., *399] *M. C. 219*; but in the former case the indictment did not allege that the child was not legally settled in the parish in which it had been left by its mother; and in the latter, it was held to be a fatal objection to the indictment, that it did not contain an averment that the prisoner had the means of supporting the child.

A single woman, the mother of an infant child, was indicted for neglecting to furnish it with food, the indictment alleging that she was able and had the means to do so. There was no evidence of the actual possession of means by the mother; but it was proved that she could have applied to the relieving officer of the union, and that if she had so applied, she would have been entitled to and would have received relief, adequate to the due support and maintenance of herself and child. The prisoner having been convicted, the court of criminal appeal quashed the conviction. The case was not argued by counsel, but the court in giving judgment said, "The allegation in the indictment is, that the prisoner being able and having the means neglected to maintain her child. We are of opinion that there was no evidence that she had the means of supporting it, and therefore that the allegation is not made out. To show that she might by possibility have obtained the necessary means is not sufficient." *R. v. Chandler*, Dears. C. C. 453. *R. v. Rugg*, 12 Cox, C. C. 16, C. C. R. So where a girl, eighteen years of age, was taken in labor in the house of her step-father during his absence, and the mother omitted to procure the assistance of a midwife in consequence of which the girl died, and there was no evidence that the mother had the means to pay for the midwife; it was held, that she was not legally bound to procure the aid of the midwife. *R. v. Shepherd*, L. & C. 147; 31 L. J., M. C. 102.

v. Catherine, 16 Fla. 830. On admissibility of affidavit and warrant on which defendant was arrested. *Sidelinger v. Bucklin*, 64 Me. 371; *Davis v. State*, 58 Ga. 170. The relatrix cannot recover her attorney fees. *Abshire v. State*, 52 Ind. 99. On evidence in support of the complaint. *Ray v. Coffin*, 123 Mass. 365; *State v. Bottorff*, 82 Md. 538; *State v. Pratt*, 40 Ia. 631. Where in bastardy proceedings an issue is joined on a collateral point, the defendant has a right to claim trial by jury. *State v. Beasley*, 75 N. C. 211. On a defence to the charge, by evidence to show paternity in some other man than the one accused. See *Paulk v. State*, 52 Ala. 427; *Parker v. Dudley*, 118 Mass. 602; *Sabins v. Jones*, 119 Mass. 167; *State v. Read*, 45 Ia. 469; *State v. Britt*, 78 N. C. 439; *Holcomb v. People*, 79 Ill. 409; *State v. Bennett*, 75 N. C. 305; *State v. Pratt*, 40 Ia. 631; *People v. Carney*, 29 Hun, (N. Y.) 47; *McCoy v. People*, 71 Ill. 111. On the admissibility of declarations and admissions of relatrix. See *Sidelinger v. Bucklin*, 64 Me. 371; *State v. Pratt*, 40 Ia. 631; *Tholke v. State*, 50 Ind. 355; *Welch v. Clark*, 50 Vt. 386; *McCoy v. People*, 71 Ill. 111; *Keating v. State*, 44 Ind. 449; *Booth v. Hart*, 43 Conn. 480. As to proof that the child is a bastard. See *Wilson v. Babb*, 18 S. C. 59; *Colwell's Succession*, 34 La. An. 265; *Brock v. State*, 85 Ind. 397; *State v. Romaine*, 58 Ia. 46; *State v. Worthingham*, 23 Minn. 523; *Gregley v. Jackson*, 38 Ark. 487; *Hazzard's Estate*, 13 Phila. (Pa.) 335. On the burden of proof and preponderating evidence. See *McElhany v. People*, 1 Ill. App. 550; *Semon v. People*, 42 Mich. 141; *McFarland v. People*, 72 Ill. 368. On reputation of relatrix. *Rawles v. State*, 56 Ind. 433. On variance from indictment. *Kennedy v. Shea*, 110 Mass. 152.

The indictment, however, need not allege the ability to provide ; it is sufficient if it uses the word "neglect." See *Reg. v. Ryland*, L. R. 1, C. C. R. 99 ; 37 L. J., M. C. 10. A doubt is expressed upon this point in *R. v. Rugg*, *supra* ; but the case of *R. v. Ryland* was not cited, nor was the point one which affected the decision.

For other offences against children, see *post*, p. 403.

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*CONCEALING BIRTH OF CHILD.

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Statute. The offence of concealing the birth of a child was first provided against by the 21 Jac. 1, c. 27, which was repealed by the 43 Geo. 3, c. 58. The latter statute was also repealed and the offence provided for by the 9 Geo. 4, c. 31, s. 14. This is also repealed; and now by the 24 & 25 Vict. c. 100, s. 60, "if any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child die before, at, or after its birth, endeavor to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor: provided, that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavor to conceal the birth thereof, and thereupon the court may pass such sentence, as if such person had been convicted upon an indictment for the concealment of the birth."¹

Upon a prosecution for this offence, the prosecutor, after establishing the birth of the child, must prove the secret burying or other disposal of a dead body, the identity of the body with that of the child so born, and the endeavor to conceal the birth. In general, the evidence to prove the first point will also tend to establish the last.

Secret disposition of the body. What has been a sufficient disposal of the body has hitherto been a matter of doubt. Where the evidence was, that the prisoner had been delivered of a child, and had placed it in a drawer, where it was found locked up, the drawer being opened by a key taken from the prisoner's pocket, Maule, J., directed an acquittal, being of opinion that the former statute by the words, "buried or otherwise disposed of," contemplated a final disposing of the body. *R. v. Ash*, 2 Moo. & R. 294. So where the prisoner had placed the child in a box in her bed-room, Rolfe, B., held that the disposing of the body must be in some place intended for its final

¹ See *Pennsylvania v. McKee*, Addison, 1; *Boyles v. Commonwealth*, 2 S. & R. 50. If the child is proved to have been born dead, though the mother concealed its birth, she cannot be convicted. *State v. Kirby*, 57 Me. 30. S.

deposit. *R. v. Bell*, MS. 2 Moo. & R. 294. These authorities have since been overruled. *R. v. Goldthorpe*, 2 Moo. C. C. R. 244. There the prisoner had been suspected of being with child, but always denied it, and after her delivery persisted in denying that she had been delivered, but on being pressed by the surgeon who examined *her, she confessed that the child was between the bed and the mattress, where it was discovered. The case having been re- [*401 served, was considered at a meeting of the judges in Michaelmas term, 1841, at which all the judges, except Alderson, B., Patteson, Erskine, and Bosanquet, JJ., were present, when Lord Abinger, C. B., Maule, J., and Ralfe, B., thought the conviction bad; the other judges held it good, and the conviction was affirmed. The point was again reserved in *R. v. Perry*, Dears. C. C. R. 473; 24 L. J., M. C. 137. There the prisoner placed the dead body of the child under the bolster, with the intention of endeavoring, as far as she could, to conceal the body from the surgeon, but with the intention of removing it elsewhere when an opportunity offered. This was held by the Court of Criminal Appeal (Pollock, C. B., *dissentiente*) to be disposing of a dead body within the statute. And it appears from the case of *R. v. Opie*, 8 Cox, C. C. 332, that Martin, B., took the same view as the Lord Chief Baron. Where the prisoner denied to her mistress that she was in the family way, but told the doctor she had been confined and the child was in a box in her bed-room, and the child was found in a box with the lid open in her bed-room, Byles, J., left it to the jury to say if they thought this was a secret disposition of the body. In his opinion it was not. *R. v. Sleep*, 9 Cox, C. C. 559. Where the prisoner put the dead body of her child over a wall into a field where there was no path, this was held to be a secret disposition. *R. v. Brown*, L. R. 1 C. C. R. 244; 39 L. J., M. C. 94. Where the prisoner was stopped going across a yard, in the direction of a privy, with a bundle, which on examination was found to be a cloth sewed up, containing the body of a child; it was held by Gurney, B., that the prisoner could not be convicted, the offence not having been completed. *R. v. Snell*, 2 Moo. & R. 44. Evidence was given that the prisoner denied her pregnancy, and also, after the birth of the child, denied that also; but she afterwards confessed to a surgeon that she had borne a child. The body of the child was, on the same day, found among the soil in the privy. Patteson, J., held it to be essential to the commission of the offence, that the prisoner should have done some act of disposal of the body after the child was dead; therefore if she had gone to the privy for another purpose and the child came from her unawares, and fell into the soil, and was suffocated, she must be acquitted of the charge, notwithstanding her denial of the birth of the child. The prisoner was acquitted. *R. v. Turner*, 8 C. & P. 755, 34 E. C. L. See also *R. v. Coxhead*, 1 C. & K. 623, 47 E. C. L.

Frances Douglas and one Robert Hall were indicted for the murder of a female child, of which they were acquitted; whereupon the jury were desired to inquire whether the female was guilty of endeavoring to conceal the birth. The prisoners had been living together for

some time, and in the night, or rather about four in the morning, she was delivered of the child, in the presence of the male prisoner, who was the father of it, and who, with his two sons, aged fourteen and ten, all slept on the same pallet with her, up four pairs of stairs. The male prisoner very soon afterwards put the child (which had not been separated from the after-birth) into a pan, carried it down stairs into the cellar, and threw the whole into the privy, the female prisoner remaining in bed up stairs. She was proved to have said she knew it was to be done. The fact of her being with child was, some time before her delivery, known by her mother, who lived at some distance, and was apparent to other women. No female was present at the *402] *delivery; one had been sent for at the commencement of the labor, about twelve at night, but was so ill that she could not attend. There were no clothes prepared, or other provision made, but the parties were in a state of the most abject poverty and destitution. The jury found her guilty of endeavoring to conceal the birth, and two points were reserved for the opinion of the judges: 1st, Whether there was evidence to convict the prisoner as a principal? 2ndly, whether, in point of law, the conviction was good? The case was argued before all the judges (except Park, J.), who were of opinion that the communication made to other persons was only evidence, but no bar, and that the conviction was good; but they recommended a pardon. *R. v. Douglas*, 1 Moo. C. C. 480. So in *R. v. Skelton*, 3 C. & K. 119, Vaughan Williams, J., directed the jury, that if a woman be delivered of a child which is dead, and a man take the body and secretly bury it, she was indictable for the concealment by secret burying under s. 14 of the former statute, and he for aiding and abetting under s. 31, if there was a common purpose in both in thus endeavoring to conceal the birth of the child; but that the jury must be satisfied, not only that she wished to conceal the birth, but was a party to the carrying that wish into effect by the secret burial by the hand of the man, in pursuance of a common design between them. Platt, B., had ruled in a similar way in *R. v. Bird*, 2 C. & K. 817, 61 E. C. L.

An indictment for endeavoring to conceal the birth of a child need not state whether the child died before, at, or after the birth. *R. v. Coxhead*, 1 C. & K. 623, 47 E. C. L.

It seems, *per* Martin, B., that a fetus not bigger than a man's finger, but having the shape of a child, is "a child" within the statute. *R. v. Colmer*, 9 Cox, C. C. 506; but in *R. v. Hewitt*, 4 F. & F. 1101, Smith, J., left it to the jury to say whether what the prisoner had concealed was a child or was only a fetus.

The words of the statute are "any secret disposition of the dead body;" and, where a woman deposited a child while alive in a field, and there left it to die, and the dead body of the child was afterwards found, it was held that the woman could not be convicted under the statute. *R. v. Jane May*, 10 Cox, C. C. R. 448.

Upon an indictment for the murder of a child, any person, on failure of the proof as to the murder, may be now convicted by the

statute of endeavoring to conceal the birth. Formerly no person but the mother could be so convicted. *R. v. Wright*, 9 C. & P. 754, 38 E. C. L. Where the bill for murder was not found by the grand jury, and the prisoner was tried for murder on the coroner's inquisition; it was held, that she might be found guilty of the concealment, the words of the stat. 43 Geo. 3, c. 58 (repealed), being, that "it shall be lawful for the jury, by whose verdict any person *charged* with such murder shall be acquitted, to find," and the judges holding that the coroner's inquisition was a *charge*, so as to justify the finding of the concealment. *R. v. Maynard*, Russ. & Ry. 240; *R. v. Cole*, 2 Leach, 1095; 3 Camp. 371. It may be observed, that the word *charge* does not occur in the statute 9 Geo. 4, c. 31 (repealed); yet there seems no doubt that the prisoner might be so convicted under the new statute, for she is "tried for the murder of her child," as much on the inquisition as the indictment. 1 Russ. Cri. 807 (n), 5th ed. note by Greaves.

*OTHER OFFENCES AGAINST CHILDREN.

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The offences of concealment of birth and of abandonment and neglect of children are offences which relate to children only, but additional provisions have been made for the protection of children in many cases where the act done would be an offence if done against an adult. These will be found treated of under the titles of those offences in their general character.

For child-stealing and abduction, see "Abduction."

For assaults upon children, see "Assaults."

For rape of children, see "Rape."

For manslaughter of children, see "Manslaughter."

For illtreating helpless persons, see "Illtreating Apprentices."

For murder of children, see "Murder."

For matters of defence with respect to children, see tit. "General Matters of Defence—Infancy."

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THE laws against coining and other similar offences were consolidated by the 2 & 3 Will. 4, c. 34, by which the former statutes were repealed. This statute has been now repealed, and the provisions against these offences are now contained in the 24 & 25 Vict. c. 99.

Interpretation of terms. By s. 1, "in the interpretation of and for *405] *the purposes of this act, the expression 'the queen's current gold or silver coin,' shall include any gold or silver coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her Majesty's dominions, whether within the United Kingdom or otherwise; and the expression 'the queen's copper coin,' shall include any copper coin and any coin of bronze or mixed metal coined in any part of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise, in any

part of her Majesty's said dominions; and the expression 'false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin,' shall include any of the queen's current coin which shall have been gilt, silvered, washed, colored, or cased over, or in any manner altered, so as to resemble, or be apparently intended to resemble, or pass for, any of the queen's current coin of a higher denomination; and the expression 'the queen's current coin,' shall include any coin coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person."

Counterfeiting the gold and silver coin. By s. 2, "whosoever shall falsely make or counterfeit any coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Coloring coin or metal with intent to make it pass as gold or silver coin. By s. 3, "whosoever shall gild or silver, or shall, with any wash or materials capable of producing the color or appearance of gold or silver, or by any means whatsoever wash, case over, or color any coin whatsoever, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, or shall gild or silver, or shall with any wash or materials capable of producing the color or appearance of gold or of silver, or by any means whatsoever wash, case over, or color any piece of silver or copper, or of coarse gold, or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the color or *appearance of gold, or by any means whatsoever wash, case over, or color any of the queen's current silver, coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass

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part of her Majesty's said dominions; and the expression 'false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin,' shall include any of the queen's current coin which shall have been gilt, silvered, washed, colored, or cased over, or in any manner altered, so as to resemble, or be apparently intended to resemble, or pass for, any of the queen's current coin of a higher denomination; and the expression 'the queen's current coin,' shall include any coin coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person."

Counterfeiting the gold and silver coin. By s. 2, "whosoever shall falsely make or counterfeit any coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Coloring coin or metal with intent to make it pass as gold or silver coin. By s. 3, "whosoever shall gild or silver, or shall, with any wash or materials capable of producing the color or appearance of gold or silver, or by any means whatsoever wash, case over, or color any coin whatsoever, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, or shall gild or silver, or shall with any wash or materials capable of producing the color or appearance of gold or of silver, or by any means whatsoever wash, case over, or color any piece of silver or copper, or of coarse gold, or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the color or *appearance of gold, or by any means whatsoever wash, case [406 over, or color any of the queen's current silver, coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass

for any of the queen's current gold coin ; or shall gild or silver, or shall with any wash or materials capable of producing the color or appearance of gold or of silver, or by any means whatsoever wash, case over, or color any of the queen's current copper coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold or silver coin, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Impairing or diminishing gold or silver coin. By s. 4, "who-soever shall impair, diminish, or lighten any of the queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened, may pass for the queen's current gold or silver coin, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Possession of filings or clippings of gold or silver coin. By s. 5, "whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the queen's current gold or silver coin, knowing the same to have been so produced or obtained shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Buying or selling counterfeit gold or silver coin. By s. 6, "whosoever without lawful authority or excuse (the proof whereof shall lie in the party accused) shall buy, sell, receive, pay, or put off or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, on being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be im-

prisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement. And in any *indictment for any such offence as in this section aforesaid it shall be sufficient to allege that the party accused did buy, sell, [*407 receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off the false or counterfeit coin at or for a lower rate or value than the same imports, or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off."

Importing counterfeit gold or silver coin. By s. 7, "whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall import or receive into the United Kingdom from beyond the seas, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England or Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any time not exceeding two years, with or without hard labor, and with or without solitary confinement."

Exporting counterfeit coin. By s. 8, "whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall export, or put on board any ship, vessel, or boat, for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Uttering counterfeit gold or silver coin. By s. 9, "whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."

Uttering counterfeit gold or silver coin, having possession of other counterfeit coin. By s. 10, "whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended

to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin," is liable to the same punishment as for the next offence.

***408] Uttering twice within ten days.** By the same section, "whosoever shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days next ensuing, tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Having possession of counterfeit gold or silver coin. By s. 11, "whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable at the discretion of the court, to be kept in penal servitude for the term of three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Uttering or having possession of counterfeit gold or silver coin after a previous conviction. By s. 12, "whosoever, having been convicted, either before or after the passing of this act, of any such misdemeanor or crime and offence, as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Uttering foreign coin, medals, etc., as current gold and silver coin. By s. 13, "whosoever shall with intent to defraud, tender, ut-

ter, or put off as or for any of the queen's current gold or silver coin any coin not being such current gold or silver coin, or any medal or piece of metal, or mixed metal, resembling in size, figure, and color the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal, or mixed metal so tendered, uttered, or put off, being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."

Counterfeiting, etc., copper or bronze coin. By s. 14, the various *offences relating to the copper coin are consolidated into one clause, and it is enacted, that "whosoever shall falsely make [*409 or counterfeit any coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, and whosoever, without lawful authority or excuse (the proof of which authority shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the queen's current copper coin; or shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

By s. 1 the words "copper coin" includes coin of bronze or mixed metal.

Uttering base copper or bronze coin. By s. 15, "whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."

Defacing coin. By s. 16, "whosoever shall deface any of the queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall in England or Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor."

Counterfeiting foreign gold and silver coin. By s. 18, "whosoever shall make or counterfeit any kind of coin not being the queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three [now five] years, or to be imprisoned for any term not *410] *exceeding two years, with or without hard labor, and with or without solitary confinement."

Importing foreign counterfeit gold and silver coin. By s. 19, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Uttering foreign counterfeit gold and silver coin. By s. 20, "whosoever shall tender, utter, or put off any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding six months, with or without hard labor."

Second offence of uttering foreign counterfeit gold and silver coin. By s. 21, "whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin

as aforesaid, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Third offence of uttering foreign counterfeit gold and silver coin. By the same section, "whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Counterfeiting foreign coin other than gold or silver coin. By s. 22, "whosoever shall falsely make or counterfeit any kind of coin not being the queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin, *of any foreign prince, state, or country, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime [411 and offence, and being convicted thereof, shall be liable, at the discretion of the court, for the first offence to be imprisoned for any term not exceeding one year, and for the second offence, to be kept in penal servitude for any term not exceeding seven years, and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Making, mending, or having possession of coining tools. By s. 24, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or any part or parts or both or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging, or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges, with letters, grainings, or other marks or figures

apparently resembling those on the edges of any such coin, as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal, or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for, or in order to the false making or counterfeiting any such coin as in this section aforesaid, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Conveying coining tools, etc., out of the mint. By s. 25, "who-soever, without lawful authority or excuse (the proof whereof shall lie upon the party accused), shall knowingly convey out of any of her Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging, or other tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any term not *412] *exceeding two years, with or without hard labor, and with or without solitary confinement."

Venue. By s. 28, "where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction."

As to offences committed within the jurisdiction of the Admiralty, see s. 36, *supra*, tit. "Venue," p. 254.

Proof of coin being counterfeit. By s. 29, "where, upon the trial of any person charged with any offence against this act, it shall be

necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of her Majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."

When the offence of counterfeiting is complete. By s. 30, "every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off any false or counterfeit coin against the provisions of this act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

Punishment of principals in the second degree, and accessories. By s. 35, "in the case of every felony punishable under the act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labor."

Counterfeit medals. By 46 & 47 Vict. c. 45 (the Counterfeit Medal Act), "If any person, without due authority or excuse (the proof whereof shall lie on the person accused), makes or has in his possession for sale, or offers for sale, or sells, any medal, cast, coin, or other like thing, made wholly or partially of metal or any metallic combination, and resembling in size, figure, and color any of the queen's current gold or silver coin, or having thereon a device resembling any device on any of the queen's current gold or silver coin, or *being so formed that it can by gilding, silvering, coloring, [*413 washing, or other like process to be dealt with as to resemble any of the queen's current gold and silver coin, he shall be guilty of a misdemeanor, and on being convicted shall be liable to be imprisoned for any term not exceeding one year, with or without hard labor."

Proof of counterfeiting. It is apprehended that, notwithstanding the provision in s. 30, *supra*, there must still be a substantial making or counterfeiting proved, and that it will not be sufficient merely to show that steps have been taken towards a counterfeiting. The clause appears to have been intended to provide against such cases as that of *R. v. Harris*, 1 Lea, 135, where the metal requiring a process of beating, filing, and immersing in *aqua fortis*, to render the coin passable, the judges held, that the prisoner could not be convicted of counter-

feiting. See also *R. v. Varley*, 1 Leach, 76; *Wm. Black*, 682; 1 East, P. C. 164.

The question whether the coin alleged to be counterfeit does, in fact, resemble or is apparently intended to resemble or pass for the king's current gold or silver coin, is one of fact for the jury; in deciding which they must be governed by the state of the coinage at the time.¹ Thus where the genuine coin is worn smooth, a counterfeit bearing no impression is within the law; for it may deceive the more readily for bearing no impression, and in the deception the offence consists. *R. v. Welsh*, 1 East, P. C. 164; 1 Leach, 293; *R. v. Wilson*, 1 Leach, 285. Nor will a variation, not sufficient to prevent the deception, render the coin less a counterfeit. Thus it is said by Lord Hale, that counterfeiting the lawful coin of the kingdom, yet with some small variation in the inscription, effigies or arms, is a counterfeiting of the king's money. 1 Hale, P. C. 215. In *R. v. Hermann*, 4 Q. B. D. 284; 48 L. J., M. C. 106; the Court of Crown Cases Reserved were divided in opinion as to whether a genuine sovereign which had been fraudulently filed at the edges to such an extent as to reduce its weight by one twenty-fourth part, and a new milling added to restore the appearance of the coin, was false and counterfeit within the 24 & 25 Vict. c. 99, s. 9. Lord Coleridge, C. J., Pollock and Huddleston, BB., being of opinion that it was false and counterfeit. Lush, J., and Stephen, J., being of the contrary opinion.

Where the prisoner was indicted for uttering a medal resembling a half-sovereign in size, figure, and color, it was shown that the medal was of the same diameter, and similar in color; that the guerling was round and not square; that the stamp of the head of the queen was similar to that on a half-sovereign; but that the legend was different. No evidence was given of the impression upon the reverse side of the medal, the medal being lost during the examination of the witnesses; and it was held that there was sufficient evidence that the medal resembled a half-sovereign in "size, figure, and color." *R. v. Robinson*, 1 L. & C. 604; 34 L. J., M. C. 176. It was to meet this and other similar cases that the above statute, 46 & 47 Vict. c. 45, was passed.

What is current coin may be proved by evidence of common usage or reputation; 1 Hale, P. C. 213.

Proof of uttering. Upon an indictment for the simple offence of *uttering, the prosecutor must prove the act of uttering, etc., *414] as charged, that the money was counterfeit, and that the prisoner knew it to be such. The practice of "ringing the changes" was held to be an offence under the repealed statute, 15 Geo. 2, c. 28; *R. v. Frank*, 2 Leach, 644; and it is so likewise under the present act. The coin must be proved to be counterfeit in the usual way.

The mode of proving guilty knowledge has been already considered at length, *ante*, p. 97.

Where several persons are charged with an uttering, it must appear

¹ Case of *Quin et al.*, 6 Reg. Rec. 68. S.

either that they were all present, or so near to the party actually uttering as to be able to afford him aid and assistance. Three persons were indicted for uttering a forged note, and it appeared that one of them uttered the note in Gosport while the other two were waiting at Portsmouth till his return, it having been previously concerted that the prisoner who uttered the note should go over the water for the purpose of passing the note, and should rejoin the other two. All the prisoners having been convicted, it was held that the two prisoners who had remained in Portsmouth, not being present at the time of uttering, or so near as to be able to afford any aid or assistance to the accomplice who actually uttered the note, were not principals in the felony. *R. v. Soares*, Russ. & Ry. 25; 2 East, P. C. 974. The two prisoners were charged with uttering a forged note. It appeared that they came together to Nottingham, and left the inn there together, and that on the same day, between two and three hours from their leaving the inn, one of the prisoners passed the note. Both the prisoners being convicted, the judges held the conviction wrong as to the prisoner who was not present, not considering him as present aiding and abetting. *R. v. Davis*, Russ. & Ry. 113.

It has been held that if two utterers of counterfeit coin, with a general community of purpose, go different ways and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. *R. v. Manners*, 7 C. & P. 801, 32 E. C. L. But it was held by Erskine, J., that if two persons, having jointly prepared counterfeit coin, plan the uttering, and go on a joint expedition, and utter in concert and by previous arrangement the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering. *R. v. Hurse*, 2 Moo. & R. 360. *Acc. R. v. Greenwood*, 2 Den. C. C. R. 453; 21 L. J., M. C. 127; *R. v. Skerrit*, *infra*.

The giving of a piece of counterfeit coin in charity was held not an uttering within the statute, although the person might know it to be counterfeit, for there must be some intention to defraud. *R. v. Page*, 8 C. & P. 122, 34 E. C. L. See 1 Russ. Cri. 232 (z), 5th ed., note by Greaves, where the correctness of this decision is doubted. The ruling in *R. v. Page* has also been thought questionable by Denman, C. J., and Coltman, J., in a trial at the Central Criminal Court, in which it was held that if a person gave a counterfeit coin to a woman with whom he had shortly before had intercourse, it was an uttering within the repealed statute 2 & 3 Will. 4, c. 34, s. 7; *Anon.*, 1 Cox, C. C. 250.

"To utter and put off" a thing is to "offer it, whether taken or not." *Per Jervis*, C. J., in *R. v. Welch*, 20 L. J. M. C. 101.

As to a joint uttering by a husband and wife, see *post*, tit. "Coercion by Husband."

As to uttering in forgery, see *post*, title "Forgery."

***Proof of possession of counterfeit coin.** It is a very frequent question, what amounts to the possession of counterfeit coin, both as aggravating the uttering and as itself a substantive offence: [*415

The following cases have been decided on this point. Having a large quantity of counterfeit coin in possession, many of each sort being of the same date, and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit and intended to utter it. *R. v. Jarvis*, 25 L. J., M. C. 30. In the following case, two persons were convicted of a joint uttering, having another counterfeit shilling in their possession, although the latter coin was found upon the person of one of them only. It appeared that one of the prisoners went into a shop and there purchased a loaf, for which she tendered a counterfeit shilling in payment. She was secured, but no more counterfeit money was found upon her. The other prisoner who had come with her, and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen bad shillings were found upon her, wrapped in gauze paper. It was objected, that the complete offence stated in the indictment was not proved against either of the prisoners; Garrow, B., was of opinion, that the prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering, and that it was for the jury to say whether the possession of the remaining pieces of bad money was not joint. The jury found both the prisoners guilty. *R. v. Skerrit*, 2 C. & P. 427, 12 E. C. L. The prisoner was indicted for having in his possession three or more pieces of counterfeit coin. The prisoner was taken in company with a man named Large. On their being searched, only two bad shillings were found on the former, but upon Large were found sixteen bad shillings. The jury found that the prisoner knew that Large had the sixteen bad shillings in his possession; that he knew that all the shillings found on Large and himself were counterfeit, and that both parties had the common purpose of uttering them. Alderson, B., thereupon directed the jury, that the possession of Large was the possession of the prisoner; and if so, that the latter had three or more counterfeit pieces in his possession, although only two were found upon him. The prisoner being convicted, the learned judge reserved the point for the consideration of the judges, thinking that a difficulty arose out of the interpretation clause, which seemed to confine the possession to the personal custody or possession of the party accused. On the case being argued before the judges, they were divided in opinion; but a majority held that the possession of Large was the possession of the prisoner, and that the latter was properly convicted. *R. v. Rogers*, 2 M. C. C. 85; 2 Lewin, C. C. 119, 297. So where one of two persons in company utters counterfeit coin, and other counterfeit coin is found on the other person, they are jointly guilty of the aggravated offence, of acting in concert, and both knowing of the possession. *R. v. Gerrish and Brown*, 2 Moo. & R. 219. See, also, *R. v. Williams*, Carr. & M. 259, 41 E. C. L.¹ See now the interpretation clause of the act, *ante*, p. 404.

¹ Having in possession instruments for coining, with an intent to counterfeit money, is a misdemeanor at common law. *Murphy's Case*, 4 Rog. Rec. 42; *Dorsett's Case*, 6

The guilty knowledge will be proved in the same manner as under an indictment for uttering false coin, *ante*, p. 95.

Proceedings for twice uttering. If it is intended to punish the prisoner as for twice uttering, under s. 10, he must be specially *indicted; for upon the corresponding clause of the repealed statute, 2 & 3 Will. 4, c. 34, s. 7, where a prisoner was convicted under the first part of the above section, of two single utterings contained in two counts of the same indictment, the judges held that one judgment for two years' imprisonment was bad, and that there should have been two consecutive judgments of one year's imprisonment each. *R. v. Robinson*, 1 Moo. C. C. 413.

Proceedings after a previous conviction. By sect. 37 of 24 & 25 Vict. c. 99, where any person shall have been convicted of any offence against this act, or any former act relating to the coin, and shall afterwards be indicted for any offence against this act, committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows: (that is to say) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly;

Id. 77. An averment that the defendant *secretly* kept instruments for counterfeiting, sufficiently avers *a scienter*. *Sutton v. State*, 9 O. 133. On an indictment for counterfeiting coin, the criminal participation of the defendant may be inferred by the jury from the fact that a large quantity of spurious coin, and various instruments and appliances for coining, were found in his possession, unless such possession be satisfactorily explained by him. *United States v. Burns*, 5 McL. 23; *United States v. King*, *Id.* 208. S.

but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided that if upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

The above section applies to indictments under s. 12. In the former editions of Archbold's Criminal Pleading, the form of indictment under sect. 12 used to commence with charging the previous conviction, and it was the usual custom at the trial to prove the *417] "previous conviction first, in order to show that the offence amounted to a "felony." This has now been altered, and it has been held that the mode of proceeding provided by the above section must in all cases be followed. *R. v. Martin*, L. R. 1 C. C. R. 214; 39 L. J., M. C. 31; *ante*, p. 194. But in an indictment under s. 12, for the felony of uttering counterfeit coin after a previous conviction for a like offence, if the jury find the prisoner guilty of the uttering, but negative the previous conviction, he cannot be convicted of the misdemeanor of uttering. *R. v. Thomas*, L. R. 2 C. C. 141; 44 L. J., M. C. 42 (*ante*, p. 84).

Offences relating to coining tools. The prisoner employed a die-sinker to make, for a pretended innocent purpose, a die, calculated to make shillings; the die-sinker suspecting fraud, informed the commissioners of the Mint, and under their directions made the die for the purpose of detecting the prisoner. On a case reserved, it was held that the die-sinker was an innocent agent, and that the prisoner was rightly convicted as a principal, under the 2 Will. 4, c. 34, s. 10. *R. v. Bannen*, 2 Moody, C. C. R. 309; 1 C. & K. 295, 47 E. C. L.; *R. v. Harvey*, L. R. 1 C. C. R. 284; 40 L. J., M. C. 63, *infra*. The particular tool specified must be proved.¹ With regard to all the tools mentioned in the new statute, it should be observed that they are described to be such as will impress "any *part* or *parts* of both or either of the sides" of any of the king's current gold or silver coin; a description of tool not included in the former acts. The new statute, like the former, divides the coining instruments into those upon which there shall be "made or impressed," and those "which will make and impress" the figure, etc., of both or either of the sides of the lawful coin. The following case therefore is still applicable: The prisoner

¹ If one pass counterfeit money, and another in any way aids and abets its passage, knowing it to be counterfeit, an intent to defraud may be inferred, and both are guilty. *State v. Mix*, 15 Mo. 153. S.

was indicted for having in his custody a mould upon which there was made and impressed, etc., the figure of a shilling. The mould bore the resemblance of a shilling inverted, viz., the *convex* parts being *concave* in the mould; and it was objected that it should have been described as an instrument which *would make or impress*, etc., and not as one on which *was made and impressed*, etc.; but a great majority of the judges were of opinion that the evidence maintained the indictment, because the stamp of the current coin was impressed upon the mould. They agreed, however, that it would have been more accurate had the instrument been described as one "which would make or impress." *R. v. Lennard*, 1 Leach, 92; 1 East, P. C. 170.

To convict a prisoner upon an indictment under the repealed statute, 2 & 3 Will. 4, c. 34, s. 10, charging him with having in his possession "one mould upon which was impressed the figure and apparent resemblance" of the obverse side of a shilling, Patteson, J., held that the jury must be satisfied that, at the time the prisoner had it in his possession, the *whole* of the obverse side of a shilling was impressed on the mould. *R. v. Foster*, 7 C. & P. 494, 32 E. C. L. But on a second indictment against the same prisoner, under the above section, for making a mould "intended to make and impress the figure and apparent resemblance" of the obverse side of a shilling, the same learned judge ruled that it was sufficient to prove that the prisoner made the mould, and a part of the impression, though he had not completed the entire impression. *Id.* 495. An indictment alleging that the prisoner had in his possession a mould, "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of *a sixpence, was held bad, on demurrer; as not sufficiently [*418 showing that the impression was on the mould *at the time* it was in the prisoner's possession. A fresh indictment, with the words "then and there" before the words "made and impressed" was held good. *R. v. Richmond*, 1 C. & K. 240, 47 E. C. L.

Upon the repealed statute of 8 & 9 Will. 3, c. 26, it was held that it was not confined to such instruments as, used by the hand, unconnected with any other power, will produce the effect. A collar marking the edge, by having the coin forced through it by machinery, is an instrument within the act, though this mode of marking the edges is of modern invention. *R. v. Moore*, 1 Moody, C. C. 122.

The words "figure, stamp, or apparent resemblance," do not mean an exact resemblance; but if the instrument will impress a resemblance in point of fact such as will impose upon the world, it is sufficient. *R. v. Ridgely*, 1 East, P. C. 171; 1 Leach, 189. See *R. v. Richmond*, as to how the indictment should be framed, where a coining mould is made and impressed to resemble the obverse of a coin which is partly defaced by wear. 1 C. & K. 240, 47 E. C. L.

The section (s. 24) says, "whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused), etc." An indictment charged that the prisoner "without lawful excuse, etc." It was held that the indictment must negative the excuse although the burden of proof is cast upon the accused, but that it need only nega-

tive the "lawful excuse" (which included lawful authority). *R. v. Harvey*, L. R., 1 C. C. R. 284; 40 L. J., M. C. 63.

The prisoner's intention as to the use he intends to make of dies of current coin need not be inquired into; if he is knowingly in possession of them without lawful authority or excuse, that is a felony. *Id. supra.*

*COMPOUNDING OFFENCES, ETC.

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Compounding felonies. Though the bare taking again of a man's own goods which have been stolen (without favor shown to the thief) is no offence, *Hawk. P. C. b. 1, c. 59, s. 7*; yet where a man either takes back the goods, or receives other amends, on condition of not prosecuting, this is a misdemeanor punishable by fine and imprisonment. *Id. s. 5.*¹ And so in any other felony an agreement not to prosecute an indictment for reward is punishable as a misdemeanor; though nearly all the precedents of indictments for this species of offence seem to be confined to *theft-bote*, or that kind of composition of felony which has reference to the recovery of property of which the owner has been deprived. Where, in an indictment for compounding a felony, it was averred that the defendant did desist, and from that time hitherto had desisted from all further prosecution, and it appeared that after the alleged compounding he prosecuted the offender to conviction, *Bosanquet, J.*, directed an acquittal. *R. v. Stone*, 4 C. & P. 379, 19 E. C. L.; see 1 *Rus. Cri.* 293 (*k*) 5th ed.

Compounding misdemeanors. Whether, at common law, the compounding of misdemeanor is in any case a misdemeanor, is perhaps doubtful. Such agreements, when not made under the permission of a court of justice, are clearly, in many cases, illegal. *Collins v. Blantern*, 2 Wils. 341; 4 Bl. Comm. 363; *Beeley v. Wingfield*, 11 East, 46; *R. v. Hardey*, 14 Q. B. 529, 68 E. C. L. And even when made with the permission of the court, *Keir v. Leeman*, 9 Q. B. 371, 58 E. C. L.

Compounding informations on penal statutes. By 18 Eliz. c. 5, s. 4, if any informer, by color or pretence of process, or without process upon color or pretence of any manner of offence against any penal law, make any composition, or take any money, reward, or promise of reward, without the order or consent of the court, he shall stand two hours in the pillory, be forever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This statute does not

¹ Taking a promissory note as a consideration for not prosecuting a larceny, is sufficient to constitute the offence. *Commonwealth v. Pease*, 16 Mass. 91. See *Commonwealth v. Corry*, 2 Mass. 524. S.

extend to penalties only recoverable by information before justices. *R. v. Crisp*, 1 B. & Ald. 282. But it is not necessary, to bring the case within the statute, that there should be an action or other proceeding pending. *R. v. Gotley*, Russ. & Ry. 84. A mere threat to prosecute for the recovery of penalties, not amounting to an indictable offence at common law, is yet, it seems, within the above statute. *R. v. Southerton*, 6 East, 126. A person may be convicted, under this *420] *statute, of taking money, though no offence liable to a penalty has been committed by the person from whom the money is taken. *R. v. Best*, 2 Moo. C. C. 124; 9 C. & P. 868, 38 E. C. L.

Misprision of felony. Somewhat analogous to the offence of compounding felony is that of misprision of felony. Misprision of felony is the concealment or procuring the concealment of felony, whether such felonies be at common law or by statute. Hawk. P. C. b. 1, c. 59, s. 2. Silently to observe the commission of a felony, without using any endeavor to apprehend the offender, is a misprision. *Id.* (n); 1 Hale, P. C. 431, 448, 533. If to the knowledge there be added assent, the party will become an accessory. 4 Bl. Comm. 121. The punishment for this offence is fine and imprisonment, and provision against the commission of it by sheriffs, coroners, and other officers, are contained in the 3 Edw. 1, c. 9.

Taking rewards for helping to recover stolen goods—advertising rewards, etc. Similar to the offence of compounding a felony is that of taking a reward for the return of stolen property, and advertising a reward for the same purpose. These offences were formerly provided against by the statute, 7 & 8 Geo. 4, c. 29, ss. 58, 59 (E.); and the 9 Geo. 4, c. 55, ss. 51, 52 (I.), which are repealed; and now by 24 & 25 Vict. c. 96, s. 101, “whosoever shall corruptly take any money or reward, directly or indirectly, under pretence, or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of as in this act before mentioned, shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same, be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of eighteen years, with or without whipping.” Upon an indictment under this statute, it is not necessary to show that the prisoner had any connection with the commission of the previous felony; it is sufficient if the evidence satisfies the jury that the prisoner had some corrupt and improper design when he received the money, and did not *bond fide* intend to use such means as he could for the detection and punishment of the offender. *R. v. King*, 1 Cox, C. C. 36. Where A. was charged under

s. 58, with corruptly and feloniously receiving from B. money under pretence of helping B. to recover goods before then stolen from B., and with not causing the thieves to be apprehended, three questions were left for the jury: 1. Did A. mean to screen the guilty parties, or to share the money with them? 2. Did A. know the thieves, and intend to assist them in getting rid of the property by promising B. to buy it? 3. Did A. know the thieves, and assist B., as her agent, and at her request, in endeavoring to purchase the stolen property from them, not meaning to bring the thieves to justice? The jury answered the first two questions in the negative, and the third in the affirmative. It was held that the receipt of the money under the above circumstances was a corrupt receiving of the money by A. within the statute. *R. v. Pascoe*, 1 Den. C. C. R. 456; 18 L. J., M. C. 186.

*By s. 102, any person advertising a reward for the return of property stolen or lost, and using any words purporting that no questions will be asked, or that a reward will be given for property stolen or lost without seizing or making any inquiry after the person producing such property, or promising to return to any pawnbroker or other person who may have bought or advanced money upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or any person printing or publishing such advertisement. shall forfeit fifty pounds, to be recovered by action of debt. [*421]

***422] *CONCEALMENT OF DEEDS AND INCUMBRANCES.**

By the 22 & 23 Vict. c. 35, s. 24, "any seller or mortgagor of land or of any chattels, real or personal, or chases in action conveyed or assigned to a purchaser, or the solicitor or agent of any such seller or mortgagor who shall, after the passing of this act, conceal any settlement, deed, will, or other instrument material to the title, or any incumbrance, from the purchaser, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases, to defraud, shall be guilty of a misdemeanor, and, being found guilty, shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any term not exceeding two years, with or without hard labor, or both, as the court shall award."

And by the 23 & 24 Vict. c. 38, s. 8, the above section is to be read as if the words "or mortgagee" had followed the word "purchaser" in every place where that word is introduced in the section.

By the Land Titles and Transfer of Land in England Act, 38 & 39 Vict. c. 87, s. 99, if in the course of any proceedings before the registrar or the court in pursuance of this act, any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, attempts to suppress, or is privy to the suppression of any document or of any fact, the person so suppressing, attempting to suppress, or privy to suppression, shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labor, or to be fined such sum, not exceeding five hundred pounds, as the court before which he is tried may award.

*CONSPIRACY.

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Preferring indictments for conspiracy. By the 22 & 23 Vict. c. 17, s. 1, no bill of indictment for conspiracy is to be presented to or found by any grand jury, except under the circumstances there mentioned. See *ante*, p. 192. See this statute in the Appendix. And see also 30 & 31 Vict. c. 35, s. 1, in Appendix.

Nature of the crime of conspiracy. The earliest mention of the crime of conspiracy is to be found in the statute 33 Edw. I., entitled "Ordinatio de Conspiratoribus." It defines the offence thus: "Conspirators be they that do confeder and bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite or cause to indite or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprises, and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords which by their seignory office or power undertake to bear or maintain quarrels, pleas or debates that concern other parties than such as touch the estates of their lords or themselves." This is called in the statute a "final definition of conspirators." In process of time the word came to have a wider interpretation (see, for the history of the change, Wright's "Law of Criminal Conspiracies and Agreements," 1—18). In modern books numerous definitions of conspiracy occur: see *R. v. Vincent*, 9 C. & P. 91, 38 E. C. L.; *R. v. Seward*, 1 A. & E. 706, 28 E. C. L.; *R. v. Peck*, 9 A. & E. 686, 36 E. C. L.; *R. v. Jones*, 4 B. & Ad. 345, 24 E. C. L.; 3 Russ. Cri. 109, 5th ed.; *R. v. Parnell*, 14 Cox, C. C. 508; they all, in effect, amount to this, that a conspiracy is an agreement between two or more persons to do that which is unlawful.¹ "It consists not merely in the

¹ 1 Wheel. C. C. 149, 222; *Commonwealth v. Hunt*, 4 Metc. 111; *People v. Mather*, 4 Wend. 229. All who accede to a conspiracy after its formation are equally guilty with the original conspirators. *Id.* It may be between principal and clerk. *Case*

intention of two or more, but in the *agreement* of two or more to do an unlawful act, or to do a lawful act by unlawful means."

*424] **Mulcahy v. Reg., L. R., 3 H. L. 317.* It must be by two at least, for if two be tried together the jury cannot be satisfied of the guilt of either if they are not satisfied of the guilt of both, *R. v. Manning, 12 Q. B. D. 241*; and husband and wife cannot be guilty of the offence of conspiracy because they are one person at law. *Hawk. c. 72, s. 8.* Of course it makes no difference whether the final object be unlawful, or the means be unlawful: in either case the conspiracy is equally indictable.

of *Robbins et al., 4 Rog. Rec. 1*; *Commonwealth v. Judd, 2 Mass. 329*; *Commonwealth v. Davis, 9 Id. 415*; *State v. Ritchie, 4 Halst. 223*; *State v. Buchanan, 5 H. & J. 317*; *State v. Cawood, 2 Stew. 360*; *Collins v. Commonwealth, 3 S. & R. 220*; *Commonwealth v. McKisson, 8 Id. 420.* A conspiracy to commit a felony, if the felony be actually committed, is merged. *Commonwealth v. Kingsbury et al., 5 Mass. 106.* *Aliter, in a misdemeanor.* *People v. Mather, supra*; *Commonwealth v. Delaney, 1 Gr. Cases, 224.* See *Commonwealth v. O'Brien, 12 Cush. 84.* The offence of conspiracy to impede an officer in the discharge of his official duty will not merge in the offence of impeding the officer. *State v. Noyes, 25 Vt. 415.* The offence of conspiring is of common law origin, and not restricted or abridged by the statute, 33 Edw. 1. An indictment will lie at common law for a conspiracy: 1. To do an act not illegal or punishable if done by an individual, but immoral only. 2. To do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public. 3. To extort money from another or to injure his reputation, by means not indictable, as verbal defamation, and whether it be to charge him with an indictable offence or not. 4. To cheat a person, accomplished by means of an act which would not in law amount to an indictable cheat in an individual. 5. To impoverish or ruin a third person in his trade or profession. 6. To defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured. 7. To defraud, though the means be not determined on at the time. *State v. Buchanan et al., 5 H. & J. 317.* A conspiracy may be criminal, although for the purpose only of getting possession of land, by means of an extorted deed, in favor of the legal owner. *State v. Shooter, 8 Rich. 72.* A conspiracy to commit an assault and battery is an indictable offence. *Commonwealth v. Putnam, 23 Pa. St. 296.* See generally, *United States v. Cole, 5 McL. 513*; *Hazon v. Commonwealth, 23 Pa. St. 366*; *Alderman v. People, 4 Mich. 414*; *Smith v. People, 25 Ill. 17*; *People v. Clark, 10 Mich. 310*; *State v. Potter, 28 Ia. 554*; *Commonwealth v. Wallace, 82 Mass. 221*; *Lowery v. State, 30 Tex. 402.* A charge of a conspiracy "to cheat and defraud" one of his goods is insufficient, as not necessarily importing a criminal offence. The means by which this purpose was to be effected must be set forth so that it may be seen that it was a conspiracy to effect the object by illegal means. *State v. Read, 40 Vt. 113.* The gist of conspiracy is the unlawful confederation; and it is not necessary to prove an overt act in pursuance of it. *State v. Pulte, 12 Minn. 164.* [*Bloomer v. State, 48 Md. 521.*] A conspiracy by workmen to quit their employer in a body, unless certain other workmen are dismissed, is indictable. *State v. Donaldson, 3 Vr. 151.* Every association is criminal whose object is to raise or depress the price of labor, beyond what it would bring were it left without artificial excitement. *Commonwealth v. Carlisle, 1 Journal Jurisp. 225.* See *The Trials of the Journeymen Cordwainers, Philadelphia, 1806*; *New York, 1810*; *Pittsburgh, 1816*; *Pamphlets.*

A conspiracy to commit felony is a misdemeanor which becomes merged in the higher crime when consummated. *Commonwealth v. Blackburn, 1 Duv. 4.* Where two persons combine to steal from the persons of a crowd and one of them attempts to steal while the other abets him, both are guilty of the attempt; and the attempt is not merged in the conspiracy. *State v. Wilson, 30 Conn. 500.* S.

It is no bar to an action for conspiring fraudulently to induce the plaintiff to come into the State with intent to cause his arrest, that he submitted to the jurisdiction without pleading the illegality of his arrest in abatement. *Cook v. Brown, 125 Mass. 30, 31.* In a conspiracy each is liable for any act which results from an attempt to further the design. *The Anarchists' Case, 12 N. E. Rep. 865*; *s. c. 6 Am. Crim. Rep. 570.*

Notwithstanding the high authority on which this definition is founded it is unsatisfactory, inasmuch as the word "unlawful," upon which it turns, is ambiguous, and appears to be used in the definition in a sense in which it is used nowhere else. It does not mean "criminal," for there are many cases in which a combination to do a thing is a crime, although the act itself, if done by an individual, would not be a crime; for instance, it is a crime to conspire to seduce a woman, though seduction itself is not a crime. On the other hand, "unlawful" does not mean "tortious," for there are torts which it is not a crime to conspire to commit, as, for instance, an ordinary trespass. Nor, again, does any case go so far as to decide that a combination to commit a breach of contract is a conspiracy. Hence, the word "unlawful," in the definition of conspiracy, has no precise meaning, and the definition is in reality no definition at all. On comparing the cases referred to below, the following propositions may be deduced from them, which perhaps approach as nearly to a definition as the vagueness of the law will permit.

1. A combination to commit any crime is an indictable conspiracy. A strong case of this is afforded by the case of *R. v. Bunn* and others, 12 Cox, C. C. 316, in which several persons were convicted of a conspiracy for agreeing together to commit an offence by breaking a contract of service without notice, and were sentenced upon conviction to a heavier penalty than would have been inflicted upon any of them individually. As to this see now the recent statute, 38 & 39 Vict. c. 86, ss. 3, 4, 5, *post*, p. 442.

2. A combination to commit a civil injury is an indictable conspiracy in many, though it is impossible to say precisely in what, cases.

3. Combinations to do acts which the courts regarded as outrages on morality and decency, or as dangerous to the public peace, or injurious to the public interest, have in many cases been held to be conspiracies.

The vagueness of the second and third of these propositions leaves so broad a discretion in the hands of the judges that it is hardly too much to say that plausible reasons may be found for declaring it to be a crime to combine to do almost anything which the judges regard as morally wrong or politically or socially dangerous. The power which the vagueness of the law of conspiracy puts into the hands of the judges is something like the power which the vagueness of the law of libel puts into the hands of juries. The case of the law of conspiracy as it affects workmen, who combine to raise their wages (see p. 438), is a remarkable illustration of this.

With regard to civil injuries, it may be observed that wherever a combination to commit such an injury has been held to be criminal the injury has been malicious, that is to say, the parties have not been under a *bona fide* mistake as to a matter of fact, which, if true, would have justified their conduct. Thus, a combination to walk *over a field, or to pull down fences, would not be a conspiracy, [*425 if the object was to try a question as to a right of way, though it certainly would be a combination to commit an act unlawful in the

sense of being a tort. On the other hand, a conspiracy to commit a fraud may be indictable though the fraud is not in itself indictable. In the case of *R. v. Warburton*, the defendant and another person conspired to defraud the defendant's partner of partnership property under such circumstances that the fraud was perhaps not criminal in itself. Cockburn, C. J., in delivering the judgment of (L. R., 1 C. C. R. 273—7) the Court for Crown Cases Reserved, said, "It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i. e., amount to a civil wrong." The generality of these expressions must probably be confined by reference to the particular class of civil wrongs under consideration, namely, "civil wrongs by fraud and false pretences."

Another remarkable circumstance connected with the law of conspiracy is, that it renders it possible by a sort of fiction to convert an act innocent in itself into a crime by charging it in the indictment as an overt act of a conspiracy of which there is no other evidence than the act itself. In other words, if the jury choose to impute bad motives to an act *prima facie* innocent, they can convict those who combine to do it of conspiracy. Upon an indictment of this sort, Rolfe, B., made the following observations: "What the prosecutors of this indictment have done is this, they have not proceeded under the statute (6 Geo. 4, c. 129, repealed) to indict the parties for the alleged illegal act, but they undertake to show that there was a general combination amongst them all to effect these illegal acts, and for that it is they have indicted them. That is a legal course to pursue, and being legal, I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be, however, much more satisfactory to my mind, if the parties were indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is the proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal." *R. v. Selsby*, 5 Cox, C. C. 495. So where persons were indicted for a conspiracy to commit an unnatural offence, upon evidence which, though weak, tended, as far as it went, to show the actual commission of the offence, Cockburn, C. J., referring to the language of Rolfe, B., said: "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses." *R. v. Boulton*, 12 Cox, C. C. at p. 93. It is one of the objections to making crimes of mere in-

tentions or private agreements, of which explicit evidence is seldom to be had, that such definitions usually involve this inconvenience. Thus the gist of the crime of high treason is compassing and *imagining the king's death, but the most indifferent overt act may be treason, if the jury choose to impute to it such a motive. [*426 Thus the overt act of treason for which Lord Preston and others were convicted and sentenced to death was hiring a boat at Surrey Stairs, 12 How. St. Tr. 727. Nor need there be any overt act at all in the ordinary sense, the mere conspiracy being an agreement and therefore an overt act. *Mulcahy v. Reg. infra*; and see *Heymann v. The Queen*, 12 Cox, C. C. 303; L. R., 8 Q. B. 102.

There is another point connected with the law of conspiracy, which is involved in great obscurity: namely, whether any one of the parties must have proceeded to the commission of some act in furtherance of the conspiracy, or, as it is usually called, some overt act.

The authorities seem to stand thus. In the *Poulterers' Case*, 9 Co. 55 b., Lord Coke says that, "a man shall have a writ of conspiracy, *although they do nothing but conspire together*, and he shall recover damages, and they may also be indicted thereof." (p. 56 b.) In the next page he mentions, as the first incident of the crime of conspiracy (or, as he calls it, *confederacy*), that, "it ought to be declared *by some manner of prosecution*, as in this case it was, either by making of bonds, or of promises one to the other." In *R. v. Best*, 2 Ld. Raym. 1167, it is said in the marginal note that "an illegal conspiracy is indictable, though nothing is done in pursuance of it." This was so contended by counsel in that case, but from the indictment it does not appear that any such contention was necessary, and the judgment is silent on the point.

In *R. v. Kinnersley Str.* 193, which is frequently referred to as an authority that no overt act need be proved, no such point arose. All that was there decided was that no overt act need be laid in the indictment, as is now well settled. So also in the case of *R. v. Spragg*, 2 Burr. 993, Lord Mansfield expressly reserves his opinion on the subject now under consideration, pointing out that it was not necessary for the decision of that case. And in *Mulcahy v. Reg.*, L. R., 3 H. L. 306; it was laid down that the agreement of two or more persons is an act in advancement of the intention which each has conceived in his mind.

The practical importance of this difficulty is lessened by the fact that the existence of the conspiracy until revealed by some overt act is rarely known, and it therefore seldom becomes, under such circumstances, the subject of the indictment.

Of course an overt act committed by any one of the conspirators would be sufficient, for on the general principles of agency as applied to criminal law, such an act would be the act of all.

It was said by Lord Ellenborough that a mere agreement to commit a civil trespass would not be the subject of indictment. *R. v. Turner*, 18 East, 228. But this decision is not at all borne out by the

definitions above referred to; and in *R. v. Rowlands*, 17 Q. B. 686, 79 E. C. L., Lord Campbell said, "I have looked most elaborately into all the authorities which were cited, and as to Turner's case I have no doubt whatever that it was wrongly decided." In Turner's case the agreement was to go and take hares by night in a preserve, armed with offensive weapons; which was rather a strong one to hold to be a mere civil trespass. The same learned judge held that a conspiracy to hiss an actor or damn a play would be indictable. *Clifford v. Brandon*, 2 Camp. 358; 6 T. R. 628. So a conspiracy to impoverish A. B., a *tailor, and to prevent him carrying on his trade, has been held *427] to be indictable. *R. v. Eccles*, 1 Lea. 274; 3 Dougl. 337. In *R. v. Carlisle, Dears. C. C. 337*; 23 L. J., M. C. 109, S. sold a mare to B. for 39*l.*, and before the price was paid, B. and C. conspired together falsely and fraudulently to represent to S. that the mare was unsound, in order to induce S. to accept 27*l.* instead of the agreed price of 39*l.*; and it was held that this was indictable as a conspiracy. So it has been held to be indictable to conspire to raise the price of funds by spreading false reports; *R. v. De Berenger*, 3 M. & S. 67; or of any vendible commodity; *R. v. Aspinall and others, infra*, Blackburn, J., and Brett, J. A.; to conspire to raise a false claim to property by contracting a marriage; *R. v. Robinson*, 1 Lea. 44; and to conspire to induce persons to take shares in a new company, to which was to be transferred the business of an old company known to the conspirators to be hopelessly insolvent and worthless, with a view of defrauding and cheating the persons so taking and paying for their shares of the price which they would have to pay. *R. v. Gurney and others*, 11 Cox, C. C. 439-40.¹

An indictment charged the defendants in a second count with having conspired in order to obtain a quotation of shares in the Stock Exchange List, to induce persons who should thereafter buy and sell shares to believe that the company was duly formed and constituted, and had complied with the rules of the Stock Exchange, so as to en-

¹ A conspiracy to manufacture a base material in the form and color of genuine indigo, with intent to sell it as genuine, is indictable. *Commonwealth v. Judd et al.*, 2 Mass. 329; S. C. 2 Wheel. C. C. 293. So a conspiracy between persons in falsely pretending they were about to enter in business, whereby they obtained goods on credit, when the intention was to procure the goods, sell them at an under price, and leave the Commonwealth, is indictable. *Commonwealth v. Ward*, 2 Mass. 473. [A conspiracy to defraud the government of revenue is indictable. *United States v. Rindskoff*, 6 Biss. 259; *United States v. Babcock*, 3 Dill, 581. For conspiracy to import goods without duty. *United States v. Graff*, 14 Blatchf. 381.] But it has been held not an indictable offence for several persons to conspire to obtain money from a bank, by drawing their checks on the bank when they have no funds there. *State v. Richie*, 4 Halst. 223. To constitute the offence of conspiracy, there must be a conspiracy to cheat and defraud some person of his property. Although there may have been an intention to defraud, yet if the means used could not possibly have that effect, the offence is not complete. *March v. People*, 7 Barb. 391. The obtaining possession of goods under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use, in fraud of the seller, is such a fraud or cheat as may be the subject of a conspiracy. *Commonwealth v. Eastman*, 1 Cush. 189. To constitute the crime of conspiracy, it is not necessary that the conspirators should succeed. *State v. Norton*, 3 Zab. 33; *People v. Chase*, 16 Barb. 495. S.

title the company to have their shares quoted in the official list. The Court of Queen's Bench held the count was good, although there was no averment that the object sought was to injure persons by inducing them to deal in the shares of the company. Cockburn, C. J., and Blackburn, J., intimated it would have been more prudent to have added some such averment, so as to make the offence more distinct, but held that the object of the conspiracy could be sufficiently inferred by the prior averments of the indictment. The judgment of the Queen's Bench was affirmed in the Court of Appeal, the Court further holding the insufficiency of the indictment to be cured by the verdict. *R. v. Aspinall*, 1 Q. B. D. 730; 45 L. J., M. C. 129; on appeal, L. R. 2 Ap. Ca. 48; 46 L. J., M. C. 145.

In *R. v. Pywell*, 1 Stark. N. P. C. 402, it was held by Lord Ellenborough, that an agreement between two persons to give a false warranty to the purchaser of a horse was not the subject of an indictment for conspiracy; but in *R. v. Kenrick*, 5 Q. B. 49, 48 E. C. L., where the conspiracy proved was to make a false representation that horses were the property of a private person, and not of a horse-dealer, and thereby induce F. to buy them, the conviction was affirmed. This case apparently overrules *R. v. Pywell*. See *R. v. Orman*, 14 Cox, C. C. 381, *post*, p. 435.

A conspiracy to charge an innocent person with an offence is indictable; *R. v. Best*, 2 Ld. Raym. 1167; 1 Salk. 174; 3 Russ. Cri. 111, 5th ed., and it is immaterial whether the charge be true or false, successful or unsuccessful, if any of the means resorted to be unlawful; Hawk. P. C. b. 1, c. 72, ss. 3, 4; *R. v. Hollingberry*, 4 B. & C. 329, 10 E. C. L. But several persons may combine together to carry on a prosecution in a legal manner; Hawk. P. C. b. 1, c. 72, s. 7; 3 Russ. Cri. 112, 5th ed.; *R. v. Murray*, Matth. Dig. Cr. L. 90.

Any conspiracy to pervert the course of justice is, of course, indictable. Hawk. P. C. b. 1, c. 21, s. 15; *Bushell v. Barrett*, Ry. & M. 434; 1 Saund. 300; *R. v. Jolliffe*, 4 T. R. 285; *R. v. Thompson*, 16 *Q. B. 832, 71 E. C. L.; 20 L. J., M. C. 183; *R. v. Macdaniel*, 1 Lea. 45; Fost. 130; *R. v. Mabey*, 6 T. R. 619; *Cla-ridge v. Hoare*, 14 Ves. 65, or by abuse of legal process to enforce payment of money which was known to be not due. *R. v. Taylor*, 15 Cox, C. C. 265, 268.

There are numerous instances in the books of conspiracies against morality and public decency held indictable; such as a conspiracy to seduce a young woman; *R. v. Lord Grey*, 3 St. Tr. 519; 1 East, P. C. 460; or to procure an infant female to have illicit carnal connection with a man; *R. v. Mears*, 2 Den. C. C. R. 79; 20 L. J., M. C. 59; or to procure a girl, whether chaste or unchaste, to become a common prostitute; *R. v. Howell and Bentley*, 4 F. & F. 160.¹ So a conspiracy to take away a young woman, an heiress, from the custody of her friends, for the purpose of marrying her to one of the conspirators.

¹ Under the Iowa code seduction is a felony. An indictment charging a conspiracy to commit seduction need not charge that the woman was unmarried and of previous chaste character. *State v. Savoye*, 48 Ia. 562.

R. v. Wakefield, 2 Lewin, C. C. 1, 279; 1 Deac. Dig. C. C. 4. A conspiracy to prevent the burial of a corpse; though for the purposes of dissection, has been held to be an indictable offence. *R. v. Young*, cited 2 T. R. 734; 2 Chit. C. L. 36. *Vide post*, tit. "Dead Bodies."¹

There has been some discussion about conspiracies to marry paupers. Of course these are indictable if any unlawful means be used. But it has been attempted to carry the matter further, and to hold that the conspiracy to persuade paupers to marry by their own consent was itself indictable, as being an injury to the inhabitants of the parish on whom the burden of supporting the woman was thereby thrown. But this notion is now completely exploded. In a case of this kind, Buller, J., directed an acquittal, holding it necessary in support of such an indictment, to show that the defendant had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage, without the voluntary consent or inclination of the parties themselves; that the act of marriage being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means; and this, he said, had been several times ruled by different judges; *R. v. Fowler*, 1 East, P. C. 461; and the same has been determined in a recent case; *R. v. Seward*, 1 Ad. & Ell. 706, 28 E. C. L.; 3 Nev. & M. 557. Where it is stated to have been by threats and menaces, it is not necessary to aver that the marriage was had against the consent of the parties, though that fact must be proved. *R. v. Parkhouse*, 1 East, P. C. 462.

As to combinations among workmen to regulate the price of wages, see below, tit. "Conspiracies in Restraint of Trade."²

Proof of the existence of conspiracy in general. It is a question of some difficulty, how far it is competent for the prosecutor to show in the first instance the existence of a conspiracy amongst other persons than the defendants, without showing, at the same time, the knowledge or concurrence of the defendants, but leaving that part of the case to be subsequently proved. The rule laid down by Mr. East is as follows: "The conspiracy or agreement among several to act in concert for a particular end, must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner; and this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." 1 East, P. C. 96. But it is *429] *observed by Mr. Starkie that in some peculiar instances in which it would be difficult to establish the defendant's privity

¹ *Mifflin v. Commonwealth*, 5 W. & S. 461. S.

² Every association is criminal whose object is to raise or depress the price of labor, beyond what it would bring were it left without artificial excitement. *Commonwealth v. Carlisle*, 1 Journal Jurisp. 225. See *The Trials of the Journeymen Cordwainers*, Philadelphia, 1806; New York, 1810; Pittsburgh, 1816. Pamphlets. S.

without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. 2 Stark, Ev. 234, 2nd ed. So it seems to have been considered by Mr. Justice Buller, that evidence might be, in the first instance, given of a conspiracy, without proof of the defendant's participation in it. "In indictments of this kind," he says, "there are two things to be considered: first, whether any conspiracy exists; and next, what share the prisoner took in the conspiracy." He afterwards proceeds, "Before the evidence of the conspiracy can affect the prisoner materially, it is necessary to make out another point, viz., that he consented to the extent that the others did." *R. v. Hardy*, Gurney's ed. vol. i. p. 360, 369; 2 Stark. Ev. 234, 2nd ed. So, in the course of the same trial, it was said by Eyre, C. J., that, in the case of a conspiracy, general evidence of the thing conspired is received, and then the party before the court is to be affected for his share of it. *Id.* Upon a prosecution for a conspiracy to raise the rate of wages, proof was given of an association of persons for that purpose, of meetings, of rules being printed, and of mutual subscriptions, etc. It was objected that evidence could not be given of these facts without first bringing them home to the defendants, and making them parties to the combination; but Lord Kenyon permitted a person, who was a member of the society, to prove the printed regulations and rules, and that he and others acted under them in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of the society, and equally concerned; but added, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. *R. v. Hammond*, 2 Esp. N. P. C. 720. So in many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken. 3 Russ. Cri. 150, 5th ed., citing *R. v. Lord Stafford*, St. Tr. 1218; *R. v. Lord W. Russell*, 9 St. Tr. 578; *R. v. Lord Lovat*, 18 St. Tr. 530; *R. v. Hardy*, 24 St. Tr. 199; *R. v. Horne Tooke*, 25 St. Tr. 1; *R. v. Deasy*, 15 Cox, C. C. 332. The point may be considered as settled ultimately in the Queen's case, 2 Brod. & Bing. 310, 6 E. C. L., where the following rules were laid down by the judges: "We are of opinion that on the prosecution of a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and on that account, we presume, it is permitted. But it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular

proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if upon such opening it should appear manifest, that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and *430] *not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.

The rule, says Mr. Starkie, that one man is not to be affected by the acts and declarations of a stranger, rests on the principles of the purest justice; and although the courts, in cases of conspiracy, have, out of convenience, and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given in evidence, in order to establish the fact of a conspiracy, it is to be remembered, that this is an inversion of the usual order, for the sake of convenience, and that such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved. 2 Stark. Ev. 235, 2nd ed.

It has since been held, that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held, that directions given by one of the party on the day of their meeting, as to where they were to go, and for what purpose, were admissible, and the case was said to fall within *R. v. Hunt*, 3 B. & Ald. 566, 5 E. C. L., where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. *R. v. Frost*, 9 C. & P. 126, 38 E. C. L.; 3 Russ. Cri. 150, 5th ed.

Upon an indictment for a conspiracy the evidence is either direct, of a meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the case, circumstantial. 2 Stark. Ev. 232, 2nd ed.; *R. v. Cope*, 1 Str. 144. Thus, upon a trial of an information for a conspiracy to take away a man's character, by means of a pretended communication with a ghost at Cock-lane, Lord Mansfield directed the jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances. *R. v. Parsons*, 1 W. Bl. 392. Upon an information for a conspiracy to ruin Macklin, the actor, in his profession, it was objected for the defendants that, in support of the prosecution, evidence should be given of a *previous* meeting of the parties accused, for the purpose of confederating to carry their object into execution. But Lord Mansfield overruled the objection. He said, that if a number of persons met together for different purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third party, it was a conspiracy, and it was not necessary to prove any previous concert or plan among the defendants, against the person intended to be injured. *R. v. Lee*, 2

M'Nally on Evid. 634. A husband, his wife, and their servants were indicted for a conspiracy to ruin a card-maker, and it appeared that each had given money to the apprentices of the prosecutor to put grease into the paste, which spoiled the cards, but no evidence was given of more than one of the defendants being present at the same time; it was objected, that this was not a conspiracy, there being no evidence of communication; but Pratt, C. J., ruled that the defendants, being all of one family, and concerned in making cards, this was evidence of a conspiracy to go to a jury. *R. v. Cope*, 1 Str. 144; 3 Russ. Cri. 149, 5th ed.; 2 Stark. Ev. 232, 2nd ed.

If on a charge of conspiracy it appear, that two persons by their acts are pursuing the same object, and often by the same means, the *one performing part of an act, and the other completing it for the attainment of the object, the jury may draw the con- [*431] clusion that there is a conspiracy. If a conspiracy be formed, and a person join it afterwards, he is equally guilty with the original conspirators. Also if on a charge of conspiracy to annoy a broker, who distrained for church-rates, it be proved that one of the defendants (the other being present) excited the persons assembled at the public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but evidence of what a person, who was at the meeting, said some days after, when he himself was distrained on for church-rates, is not admissible. *Per Coleridge, J., R. v. Murphy*, 8 C. & P. 297, 34 E. C. L. See also *R. v. Blake*, 6 Q. B. 126, 51 E. C. L.; 13 L. J., M. C. 131.

The *existence* of the conspiracy may be established either as above stated, by evidence of the acts of third persons, or by evidence of the acts of the prisoner, and of any other with whom he is attempted to be connected, concurring together at the same time and for the same object. And here, says Mr. East, the evidence of a conspiracy is more or less strong, according to the publicity or privacy of the objects of such concurrence, and the greater or less degree of similarity in the means employed to effect it. The more secret the one and the greater coincidence in the other, the stronger is the evidence of conspiracy. 1 East, P. C. 97.¹

Proof of the existence of conspiracy—declarations of other conspirators. Supposing that the existence of a conspiracy may in the first instance be proved, without showing the participation or knowledge of the defendants, it is still a question whether the declarations of some of the persons engaged in the conspiracy, may be given in evidence against others, in order to prove its existence; and upon principle such evidence appears to be inadmissible. The opinions of the judges upon this question have been at variance. In *R. v. Hardy*, which was an indictment for high treason, in conspiring the death of the king, it was proposed to read a letter written by *Martin*, in Lon-

¹ *People v. Mosher et al.*, 1 Wheeler's C. C. 246; *People v. Mather*, 4 Wend. 229; *Commonwealth v. Clark*, 6 Mass. 74. S.

don, and addressed, but not sent, to *Margarot*, in Edinburgh (both being members of the Corresponding Society), on political subjects, calculated to inflame the minds of the people in the North; *Eyre*, C. J., was of opinion, that this letter was not admissible in evidence against any but the party confessing; two of the judges agreed that a bare relation of facts by a conspirator to a stranger, was merely an admission which might affect himself, but which could not effect a co-conspirator, since it was not an *act* done in the prosecution of that conspiracy; but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as *an act* to show the nature and tendency of the conspiracy alleged, and which therefore might be proved as the foundation for affecting the prisoner with a share of the conspiracy. *Buller*, J., was of opinion, that the evidence of the conversations and declarations by parties to a conspiracy, was in general, and of necessity, evidence to prove the existence of the combination. *Grose*, J., was of the same opinion; but added that he considered the writing *as an act* which showed the extent of the plan. *R. v. Hardy*, 25 St. Tr. 1. *Mr. Starkie* remarks, that upon the last point it is observable that of the five learned judges who gave their opinions, three of them considered the writing of the letter to be an act done; and that three of them declared their opinion that a mere declaration or confession,

*432] *unconnected with any act, would not have been admissible. 2 Stark. Ev. 236, 2nd ed. In the same case it was proposed to read a letter written by *Thelwall*, another conspirator, to a private friend. Three of the judges were of opinion that the evidence was inadmissible, since it was nothing more than a declaration, or mere recital of a fact, and did not amount to any transaction done in the course of the plot for its furtherance; it was a sort of confession by *Thelwall*, and not like an act done by him, as in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the judges were of opinion, that the evidence was admissible, on the ground that everything said and *à fortiori* everything done by the conspirators, was evidence to show what the design was.

The law on this subject is thus stated by *Mr. Starkie*: "It seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy; though consultations for that purpose, and letters written in prosecution of the design, even if not sent, are admissible. The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger, that a conspiracy existed amongst others to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on principle fully established, would not make the assertion evidence of the fact against strangers." 2 Stark. Ev. 235. And this doctrine has been recognized by *Mr. Serjeant Russell*. 3 Russ. 144, 5th ed. See also *R. v. Murphy*, *ante*, p. 431.

Proof of acts, etc., done by other conspirators. After the existence of a conspiracy is established, and the particular defendants have been proved to have been parties to it, the acts of other conspirators may, in all cases, be given in evidence against them, if done in furtherance of the common object of the conspiracy; as also may letters written and declarations made by other conspirators, if they are part of the *res gestæ* of the conspiracy, and not mere admissions.¹ See 1 Phill. Ev. 157, 10th ed.; *R. v. Hardy*, 24 How. St. Tr. 452, 475; *R. v. Sidney*, 9 How. St. Tr. 817. It seems to make no difference as to the admissibility of this evidence, whether the other conspirators be indicted or not, or tried or not; for the making of them co-defendants would give no additional strength to their declarations as against others. The principle upon which they are admissible at all is, that the acts and declarations are those of persons united in one common design; a principle wholly unaffected by the consideration of their being jointly indicted. 2 Stark. Ev. 237, 2nd ed., *supra*, p. 428. Where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a chartist association, and that Jones was also a member, and that in the evening of the 3rd of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others; it was held that a direction given by Jones, in the forenoon of the same day to certain parties to meet on the race-course, was admissible; and it being further proved that Jones and the persons assembled on the race-course went thence to *the New Inn; it was held, that what Jones said at the New Inn was admissible, as it was all part of the transaction. *R. v. Shel-* [*433
lard, 9 C. & P. 277, 38 E. C. L. The letters of one of the defendants to another have been, under certain circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a participator in the fraud. *R. v. Whitehead*, 1 Dow. & Ry. N. P. 61. Where a number of persons were charged

¹ *Collins v. Commonwealth*, 3 S. & R. 220. If three combine and conspire to defraud another as a common object, the declarations and actions of one are evidence against all. *Aldrich v. Warren*, 16 Me. 465. [See *Jones v. State*, 64 Ind. 473; *United States v. Graff*, 14 Blatch. 381; *Bloomer v. State*, 48 Md. 521. The conspiracy must be proved before the declarations of conspirators are admitted. *McAnally v. State*, 74 Ala. 9.] When several persons are proved to have been associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others. *State v. Soper*, 16 Me. 293. [The rule is that an act done by one in pursuance of an unlawful conspiracy and with reference to the common object is in contemplation of the law the act of all the conspirators. *Harden v. State*, 4 Tex. App. 355. The Anarchists' case, 12 N. E. Rep. 865, s. c. 6 Am. Crim. Rep. 570. And is therefore evidence against all. *Owens v. State*, 16 Lea, (Tenn.) 1. In a conspiracy, it is immaterial at what stage of the conspiracy any one conspirator becomes a party thereto. *Smith v. State*, 21 Tex. App. 96. See *Smith v. State*, Id. 107. The Anarchists' case, 12 N. E. Rep. 865, s. c. 6 Am. Crim. Rep. 570.] When partial proof of a combination has been given, what has been said or done by either in planning the plot, may be proved; but what was not in pursuance of the plot cannot be taken against the other conspirators. *State v. Simons*, 266. S.

with murder committed by means of an act done outside a prison in the course of a conspiracy for the purpose of liberating a prisoner, it was held, such conspiracy having been proved to exist, that acts of that prisoner, within the prison, and articles found upon him, were admissible in evidence against the persons so charged. *R. v. Desmond*, 11 Cox, C. C. 146.

Proof of the means used. Where the act itself, which is the object of the conspiracy, is illegal, it is not necessary to state or prove the means agreed upon or pursued to effect it. 3 Russ. Cri. 131, 5th ed.; *R. v. Eccles*, 1 Leach, 274. But where the indictment charged the defendants with conspiring "to cheat and defraud the lawful creditors of W. F.," Lord Tenterden thought it too general, in not stating what was intended to be done or the persons to be defrauded. *R. v. Fowle*, 4 C. & P. 592, 19 E. C. L.; but see *R. v. De Berenger*, 3 M. & S. 67, and *R. v. Gurney*, *supra*, p. 427, where an intent to defraud the general public and not any particular persons was ruled by Cockburn, C. J. (citing, with approval, *R. v. De Berenger*), to be sufficient; and see *R. v. Aspinall and others*, *ante*, p. 427, but see *White v. R.*, 13 Cox, C. C. (Irish) 318. So where the indictment charged the defendants with a conspiracy "to cheat and defraud the said H. B. of the fruits and advantages" of a verdict, Lord Denman, C. J., held it bad, as being too general. *R. v. Richardson*, 1 Moo. & R. 402. Where the indictment charged the defendants with conspiring, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof, it was held, that the *gist* of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and that it was not necessary to set out the specific pretences; Bayley, J., said that when parties had once agreed to cheat a particular person of his money, although they might not then have fixed on any means for the purpose, the offence of the conspiracy was complete. *R. v. Gill*, 2 Barn. & Ald. 204. In *R. v. Parker*, 3 Q. B. 292, Williams, J., said, "It has been always thought, that in *R. v. Gill* the extreme of laxity was allowed." But in *Sydserrf v. R.*, 11 Q. B. 246, 63 E. C. L., an indictment charging that the defendants "unlawfully, fraudulently, and deceitfully, did conspire, combine, confederate, and agree together to cheat and defraud" the prosecutor "of his goods and chattels," was held good on writ of error; and the court in giving judgment expressly upheld the decision in *R. v. Gill*. See upon this point *King v. R.*, in error, 7 Q. B. 782, 53 E. C. L.; 14 L. J., M. C. 172; *R. v. Rowland*, 2 Den. C. C. R. 364; 21 L. J., M. C. 81; and *Latham v. R.*, 9 Cox, C. C. 516; 5 B. & S. 635, 117 E. C. L.; 33 L. J., M. C. 197. When the combination becomes illegal from the means used, the illegality must be explained by proper statements, and established by proof; as in the cases already referred to of conspiracies to marry paupers. 3 Russ. Cri. 5th ed. 692; see *ante*, p. 428.¹

¹ Though usual to do so, it is not necessary to set forth the overt act. *People v. Mather*, 4 Wend. 229. In a charge for a conspiracy, if the act to be done is in itself

An indictment charged in the first count, that the defendants *unlawfully conspired to defraud divers persons who should [*434 bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit. The second count charged that two of the defendants, being in partnership in trade, and being indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments, to the great damage of the said creditors. Held, 1. That the first count was not bad for omitting to state the names of the persons intended to be defrauded, as it could not be known who might fall into the snare; but that the count was bad for not showing by what means they were to be defrauded. 2. That the second count was bad for not alleging facts to show in what manner the deed of sale was fraudulent. *Peck v. R.*, 9 A. & E. 686, 36 E. C. L. See, also, *Wright v. R.*, 14 Q. B. 148, 68 E. C. L.

An indictment charged that A. and B. conspired by false pretences and subtle means and devices, to obtain from F. divers large sums of money, of the moneys of F., and to cheat and defraud him thereof. The means of the conspiracy were not further stated. It was, however, held that this was sufficient, and that the indictment was sustained by proof that A. and B. conspired to make a representation, knowing it to be false, that certain horses were the property of a private person, and not of a horse dealer, thereby inducing F. to buy them. *R. v. Kendrick*, 5 Q. B. 49, 48 E. C. L.; overruling *R. v. Pywell*, 1 Stark. 402, *ante*, p. 427. See, also, *R. v. Blake*, 6 Q. B. 126, 51 E. C. L., and *R. v. Rowland*, 2 Den. C. C. R. 364; 21 L. J., M. C. 81.

Where an indictment charged that the defendants conspired by false pretences to obtain from persons named divers goods and merchandise, and to cheat and defraud them of the said goods and merchandise, and in pursuance of the conspiracy, did by false pretences (which were stated) obtain from them the goods, etc., aforesaid, and did cheat and defraud them thereof, to the damage of the persons named,—it was held bad in arrest of judgment in not stating whose the goods, etc., were. *R. v. Parker*, 3 Q. B. 292, 43 E. C. L. The defendants A. and B. were indicted for conspiring to extort money from the prosecutor, by charging him with forging a certain cheque for 178*l.*; the indictment set forth a letter from one of the conspirators to the prosecutor, referring to the check, and conversations were proved, relating to it. Such a document was, in fact, in existence, but it was not produced by the prosecutor at the trial, and such production was held to be unnecessary; for it might have been that the existence

illegal, the indictment need not set forth the means by which it was to be accomplished. If the act to be done is not in itself unlawful, but becomes so from the purposes for which and the means by which it is to be done, the indictment must set out enough to show the illegality. *State v. Bartlett*, 30 Me. 132. S.

of such a cheque was altogether a fabrication. *R. v. Ford*, 1 Nev. & M. 776.

Proof of the means used—cumulative instances. Upon an indictment charging the defendants with conspiring to cause themselves to be believed persons of considerable property, for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to the tradesmen employed to furnish it as persons of large fortune. A witness was then called to prove that, at a different time, they had made a similar representation to another tradesman. This evidence was objected to, on the ground that the prosecutor could not prove various acts of *this kind, but was bound to select and confine himself to one. *435] Lord Ellenborough, however, said, "This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence." *R. v. Roberts*, 1 Campb. 399.

Proof of the object of the conspiracy. The object of the conspiracy must be proved as laid in the indictment. An indictment against A., B., C., and D. charged that they conspired together to obtain, "viz.: to the use of them the said A., B., and C. and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. Lord Ellenborough said, "The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think it is not as to D. He is charged with conspiring to procure the appointment through the medium of C., of whose existence, for aught that appears, he was utterly ignorant. Where a conspiracy is charged, it must be charged truly." *R. v. Pollman*, 2 Campb. 233.

In an indictment for conspiring to defraud D. *and others*, which charged the obtaining of the goods of D. *and others*, the word *others* means partners of D., and evidence of attempts to defraud persons not the partners of D. is inadmissible. *R. v. Steel*, 2 Moo. C. C. 246; *Carr. & M.* 337, 41 E. C. L.; *R. v. Thompson*, 16 Q. B. 832; 20 L. J., M. C. 183.

Where a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding was held bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. *O'Connell v. R.*, 11 C. & F. 155; *R. v. Manning*, 12 Q. B. D. 241.

Upon a count in an indictment against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the

defendants are guilty generally, that five of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law and repugnant; inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas by the same finding it appears that the other five were guilty of conspiring to effect only some of the objects. *Id.*

A count charging the defendants with conspiring to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitutions of the realm, is bad; first, because "intimidation" is not a technical word, having a necessary meaning in a bad sense; and secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. *Id.*

A conspiracy to enable G. to obtain goods on credit, the object being that G. might re-sell them below their value to the conspirators, is indictable. *R. v. Orman*, 14 Cox, C. C. 381.

***Particulars of the conspiracy.** Where the counts of an indictment for conspiracy were framed in a general form, *Lit- [436* tledale, J., (after consulting several other judges), ordered the prosecutor to furnish the defendants with a particular of the charges, and that the particular should give the same information to the defendants that would be given by a special count. But the learned judge refused to compel the prosecutor to state in his particular the specific acts with which the defendants were charged, and the times and places at which those acts were alleged to have occurred. *R. v. Hamilton*, 7 C. & P. 448, 32 E. C. L. See further as to particulars, *ante*, p. 194. If particulars have not been delivered as directed, the evidence will not thereby be excluded. See p. 195. *R. v. Esdaile*, 1 F. & F. 213, 228.

Form of indictment. It is not uncommon to set out in the indictment the overt acts by which the object of the conspiracy was sought to be attained. But an indictment is good which charges a conspiracy to do an unlawful act without alleging any overt acts whatever; *R. v. Kinnersley*, Str. 193; *R. v. Gill*, 2 B. & Ald. 204; *R. v. Kenrick*, 5 Q. B. 49, 48 E. C. L.¹

Where the indictment alleged a conspiracy to fraudulently remove goods of one Moritz Heymann contrary to the Debtors Act, he being a trader and liable to become a bankrupt; but did not allege that the parties conspired in contemplation of or with a view to a bankruptcy; the court said that, although no overt act was necessary, yet they were

¹ It is not necessary that the character of the relation between the act and the conspiracy should be detailed in the indictment. See *U. S. v. Donan*, 11 Blatch. 168; *U. S. v. Ulrici*, 8 Dill. 532; *contra*, *State v. Clarey*, 64 Me. 369; *State v. McKinstry*, 50 Ind. 465; *U. S. v. Cruikshank*, 92 U. S. 542.

not prepared to say that the indictment ought not to have alleged the agreement or conspiracy to be in contemplation of or with a view to bankruptcy. But they held that the objection, if good on demurrer, was cured by the verdict. *Heymann v. The Queen*, L. R. 8 Q. B. 102. See also *R. v. Aspinall*, *supra*, p. 427, as to the last point.

Venue. The *gist* of the offence in conspiracy being the act of conspiring together, and not the act done in pursuance of such combination, the venue in principle ought to be laid in the county in which the conspiracy took place, and not where, in the result, the conspiracy was put into execution. *R. v. Best*, 1 Salk. 174; 3 Russ. Cri. 142, 5th ed., and see *R. v. Kohn*, *ante*, p. 257. But it has been said, by the Court of King's Bench, that there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, ought not to be tried wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war. *R. v. Brisac*, 4 East, 164. So where the conspiracy, as against all the defendants, having been proved, by showing a community of criminal purpose, and by the joint co-operation of the defendants in forwarding the objects of it in different counties and places, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of the defendants in the county where the trial was had in prosecution of the conspiracy. *R. v. Bowes*, cited in *R. v. Brisac*, *supra*.

Conspiracy to murder persons whether her Majesty's subjects or not. By the 24 & 25 Vict. c. 100, s. 4, "all persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her Majesty or not, and whether he be within the queen's dominions *437] *or not, and whosoever shall solicit, encourage, persuade, or endeavor to persuade, or shall propose to any person to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor." The prisoner, who was editor of a newspaper with a circulation of twelve hundred copies was convicted of publishing an article intending to encourage and encouraging persons to commit murder, and it was held that the conviction was right although the encouragement was not addressed to any person in particular. *R. v. Most*, 7 Q. B. D. 244; 50 L. J., M. C. 113.

*CONSPIRACIES IN RESTRAINT OF TRADE.

[*438]

THE law relating to conspiracies in restraint of trade is regulated partly by the common law and partly by statutes. Stated broadly, the result of the authorities appears to be that at common law all combinations to effect alterations in the rate of wages are illegal conspiracies, those only being excepted which are protected by the express words of certain statutes. Of these statutes there have been four, namely, 5 Geo. 4, c. 96; 6 Geo. 4, c. 129; 34 & 35 Vict. c. 32; and 38 & 39 Vict. c. 86; which last is now in force. The exceptions made to the common law doctrine by the 6 Geo. 4, c. 129, were narrower than those subsequently made, but certain decisions as to the extent of the common law have practically narrowed considerably the importance of the exceptions. The subject will, accordingly, be treated in the following order:—

1. The common law as to combinations with relation to wages as it was before the statute 6 Geo. 4, c. 129.

2. The decisions as to the extent to which the common law has been modified by the statute 34 & 35 Vict. c. 32.

3. The statute 38 & 39 Vict. c. 86.

Many decisions took place upon the statute 6 Geo. 4, c. 129, but as they turned for the most part upon the words of the Act, which is now repealed, they are here only referred to. The principal decisions under the repealed statute are *R. v. Rowlands*, *R. v. Duffield*, *R. v. Selsby*, *R. v. Hewitt*, 5 Cox, C. C. 162, 404, 436, 495; *Walsby v. Anley*, 30 L. J., M. C. 120; *O'Neil v. Longman*, 32 L. J., M. C. 259; *Skinner v. Kitch*, L. R. 2 Q. B. 393; *Wood v. Bowron*, Id. 21; *R. v. Shepherd*, 11 Cox, C. C. 325.

1. **At common law.** The common law appears to be that a purpose to raise or indeed to affect in any way the rate of wages, is one of those purposes which it is unlawful for people to try to effect by combination, though they may lawfully be effected by individual efforts, and that therefore a combination on the part of workmen to raise their wages is an indictable conspiracy.

This doctrine is no doubt harsh, and its prevalence can be explained only by reference to the considerations already stated upon the law of conspiracy. It affords a case in which the judges have availed themselves of the power which that branch of the law confers upon them, of holding that the intent to raise or affect the rate of wages artificially is so mischievous to the public, that a combination for that purpose is a crime. They were no doubt countenanced in this opinion by views of political economy now obsolete, and by the character of a

great mass of legislation now repealed. The doctrine in question rests upon the following authorities :

In 1721, Wise and several other journeyman tailors of Cambridge were indicted for a conspiracy to raise their wages, and were convicted.

*439] *In arrest of judgment it was urged that no crime appeared upon the face of the indictment, as it only charged a conspiracy and refusal to work at so much *per diem*, whereas the defendants were not obliged to work at all by the day, but by the year by 5 Eliz. c. 4 (repealed). The court said, "The indictment, it is true, sets forth that the defendants refused to work under the wages which they demanded; but although these might be more than is directed by the statute, yet it is not for the refusing to work but for conspiring that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them or any of them to do, if they had not conspired to do it." *R. v. Tailors of Cambridge*, 8 Mod. 11.

In 1799, two journeymen shoemakers were indicted for a conspiracy to raise their wages. Evidence was given that a plan for a combination of the journeymen shoemakers had been formed and printed in 1792, regulating their meetings, the subscriptions for their mutual support, and other matters for their mutual government in forwarding their designs. Evidence of this was allowed to be given before the defendants were connected with it, and it seems that upon proof of their being members of the society they were convicted. In the course of the evidence it was stated that the demands of the journeymen had been occasioned by one of the masters giving wages beyond what was usual in the trade, and Lord Kenyon said that the masters should be cautious of conducting themselves in that way, as they were as liable to an indictment for conspiracy as the journeymen. *R. v. Hammond and Welch*, 2 Esp. 719.

In 1783, seven persons were indicted for conspiring to impoverish one Booth, and to deprive and hinder him from using and exercising the trade of a tailor. The means are not set out in the indictment. Lord Mansfield said on delivering judgment, on a motion in arrest of judgment, "The illegal combination is the gist of the offence. Persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices it is an indictable offence." *R. v. Eccles*, 1 Lea. 274.

Several magistrates being indicted for a conspiracy to pervert the course of justice, by conspiring to produce in evidence a false certificate, the nature of the crime of conspiracy was much discussed, and a great number of authorities were cited to show that it might be a crime to conspire to do acts which if done by individuals would be lawful. In delivering judgment, Grose, J., said, "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their

wages: each may insist on raising his wages if he can, but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." *R. v. Mawbey*, 6 T. R. 636.

It must be borne in mind that when these cases were decided, a great number of statutes, collectively known as the combination laws, were in force. Many of them forbade, in express terms, combinations of workmen in particular trades to raise their wages. Others forbade all combinations in general terms and under severe penalties. The first of these was 2 & 3 Edw. 6, c. 15, and the last *39 & 40 Geo. 3, c. 106 (repealed). Others again authorized magistrates in quarter sessions to fix the rate of wages (see 5 Eliz. c. 4, and 1 Jac. 1, c. 6, repealed statutes). Thus the decisions above referred to were in strict uniformity, at the time when they were pronounced; both with the spirit and with the practice of the statute law.

Against this is to be set the language of Lord Campbell in *Hilton v. Eckersley*, 6 E. & B. 62, 88 E. C. L. In that case the defendant was sued on a bond which he and seven other obligors had executed, by which the obligors agreed to carry on their business on certain terms which were said to be illegal and void, as being in restraint of trade. In giving judgment that the bond was void (which was afterwards affirmed in the Exchequer Chamber), Crompton, J., referred to the language of Grose, J., in *R. v. Mawbey*, *supra*, as a proof that at common law such conditions were illegal. Lord Campbell agreed that the bond was void, but said: "I am not prepared to say that the combination which has been entered into between the parties to this bond would be illegal at common law, so as to render them liable to an indictment for a conspiracy. Such a doctrine may be deduced from the dictum of Grose, J., in *R. v. Mawbey*. Other loose expressions may be found in the books to the same effect, and if the matter were doubtful, an argument might be drawn from some of the language of the statutes respecting combinations. But I cannot bring myself to believe, without authority much more cogent, that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, and liable to be punished by fine and imprisonment. The object is not illegal, and therefore if no illegal means are to be used, there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high; and I cannot understand why, in the one case, workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters, in the other, can be considered guilty of a crime in trying by lawful means to lower them."

It is difficult to answer this reasoning upon general grounds, but the authorities quoted above appear to prove that the opinion of Lord Campbell's predecessors as to what sort of conduct was highly injurious to the public interests differed from those of Lord Campbell himself. Surely the judgments referred to above are not adequately de-

scribed by the phrase "loose expressions." Of the four cases cited two are decisions of the Court of Queen's Bench, directly upon the very point itself. The dicta of Lord Mansfield and Grose, J., are closely pertinent to the matters then under discussion, and are the more weighty because each of the judges assumes that the illegality of the combinations in question is so clear that it may be used as a proof of matter in itself more obscure. They are certainly as much in the nature of judgments as Lord Campbell's own language in *Hilton v. Eckersley*; and the language of the now repealed statute of 6 Geo. 4, c. 129, is unintelligible if the legislature did not believe, that the combinations which it expressly permitted would have been crimes in the absence of such express permission. The general result appears to be, that all combinations to effect any alteration in the rate of wages except those which were expressly excepted by 6 Geo. 4, c. 129, ss. 4, 5, were indictable conspiracies at common law.

The result, however, cannot be regarded as free from doubt, and it *441] *would be difficult to find a stronger illustration of the uncertainty produced by the absence of precise and universally binding definitions of crimes than is supplied by this branch of the law. The whole matter is discussed in full detail by Mr. Wright. (*Law of Criminal Conspiracies*, pp. 43—62.)

Decisions as the effect of 34 & 35 Vict. c. 32 (repealed statute) on common law. It must be borne in mind that neither this statute nor the statute 6 Geo. 4, c. 129, which it repealed, did away with the common law as to conspiring to coerce, which has been treated in two cases as a distinct head of the offence of conspiracy. The law upon this subject is thus stated by Bramwell, B., in *R. v. Druiitt and others*, 10 Cox, 600: "There is no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there has been so much declamation, is so sacred or so carefully guarded by the law of this land as that of personal liberty. The jury are quite aware of the pains taken by the common law, by the writ of *habeas corpus*, as it is called, and supplemented by statute, to secure to every man his personal freedom—that he shall not be put to prison without lawful excuse, and that if he is, he shall be brought before a competent magistrate within a given time, and be set at liberty or undergo punishment. But that liberty is not liberty of the body only. It is also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as is that of his body. Generally speaking, the way in which people have endeavored to control the operation of the minds of men is by putting restraints on their bodies, and therefore we have not so many instances in which the liberty of the mind has been vindicated as we have with respect to the liberty of the body. Still if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they will be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom

of will of those towards whom they so conduct themselves." He referred to coercion or compulsion—something that was unpleasant and annoying to the mind operated upon; and he laid it down as clear and undoubted law that if two or more persons agreed that they would by such means co-operate together against that liberty, they would be guilty of an indictable offence.

In *Reg. v. Bunn and others*, 12 Cox, C. C. 316, 339–40, Brett, J., in the course of summing up, said as follows: "Now I shall first ask you this: Was there an agreement or combination, which is practically the same thing, between the defendants, or between the defendants and others, or by some of them, to force Mr. Trewby, or the Gas Company, to conduct the business of the company contrary to their own will by an improper threat, or improper molestation; and I tell you that there is improper molestation if there is anything done with an improper intent, which you shall think is an annoyance or an unjustifiable interference, and which in your judgment would have the effect of annoying or interfering with the minds of the persons carrying on such a business as this Gas Company was conducting. It is not necessary, in order that there should be a conspiracy to molest, that any one should be personally molested. It is enough if you should think that a molestation was designed *and agreed upon with an improper intent, and which in your judgment would be an annoyance and an unjustifiable interference, and would in your belief be likely to have a deterring effect upon the minds of the employers—that is to say, of Mr. Trewby or the Gas Company. I tell you that the mere fact of these men being members of a trade union is not illegal, and ought not to be pressed against them in the least. The mere fact of their leaving their work—although they were bound by contract, and although they broke their contract—I say the mere fact of their leaving their work and breaking their contract is not a sufficient ground for you to find them guilty upon this indictment. This would be of no consequence of itself, but only as evidence of something else. But if there was an agreement among the defendants by improper molestation to control the will of the employers, then I tell you that that would be an illegal conspiracy at common law, and that such an offence is not abrogated by the Criminal Law Amendment Act, which you have heard referred to. This is a charge of conspiracy at common law, and if you think that there was an agreement and combination between the defendants, or some of them, and others, to interfere with the masters by molesting them, so as to control their will; and if you think that the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve, to deter them from carrying on their business according to their own will, then I say this is an illegal conspiracy, for which these defendants are liable." See also *R. v. Hibbert*, 13 Cox, C. C. 82.

The above statute repealed the 24 & 25 Vict. c. 100, s. 41, relating to assaults in pursuance of any conspiracy to raise wages, etc., and the law now relating to such offences is contained in 38 & 39 Vict. c. 86.

3. The 38 & 39 Vict. c. 86. By sect. 3 of that act, an agreement or combination by two or more persons to do or to procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.

A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned either absolutely or at the discretion of the Court as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.

By s. 4, where a person employed by a municipal authority *443] or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds or to be imprisoned for a term not exceeding three months, with or without hard labor.

Every such municipal authority, company, or contractor as is mentioned in this section shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur on summary conviction a penalty not exceeding five pounds for every day during which such

default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this act, shall be liable on summary conviction to a penalty not exceeding forty shillings.

By s. 5, where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labor.

Sect. 6 relates to neglect of apprentices, and will be found, *post*, tit. "Ill-treating apprentices."

By s. 7, every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully or without legal authority:—

(1.) Uses violence to or intimidates such other person or his wife or children, or injures his property; or,

(2.) Persistently follows such other person about from place to place; or,

(3.) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

(4.)¹ Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,

*(5.) Follows such other person with two or more other persons in disorderly manner in or through any street or road, [*444 shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labor.

Attending at or near the house or place where a person resides or works, or carries on business, or happens to be, or the approach to

¹ In New York it has been held that the "Boycott" is a conspiracy in restraint of trade. See *People v. Welzig*, 4 N. Y. Crim. Rep. 403; *People v. Kostka*, *Id.* 429. So also in Virginia, *Commonwealth v. Shelton et al.*, 11 Va. Law J. 324. In Connecticut, *State v. Glidden*, 3 N. E. Rep. 849; s. c. 8 Atl. Rep. 890; 35 Alb. Law J. 348. In England, *Reg. v. Barrett*, 18 L. R. Jr. 430. See 8 Crim. Law Mag. 574. On this subject generally see 2 Am. & Eng. Encyc. of Law, 512; 21 Am. Law Rev. 509. An interlocutory injunction will not be granted in a case where the intention of the so called Boycott is in dispute. It will be left to a jury, who may assess ample damages. *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476. If a Society or Union, acting in its associate capacity, bring about a "Strike," and uphold a striker's extraordinary demand, all who are in the Association and participate in its action are guilty. *Commonwealth v. Curren*, 3 Pittsburg (Pa.) 143. See *Old Dominion S. S. Co. v. McKenna*, 18 Abb. N. C. (N. Y.) 262.

such house or place in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section. As to this proviso see *R. v. Bauld*, 13 Cox, C. C. 282, *per* Huddleston, B.

By s. 9, where imprisonment, or a penalty of more than 20*l.* is imposed, the accused may object to the jurisdiction of the justices, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly.

Sect. 10 applies the Summary Jurisdiction Act to this Act.

By s. 11, provided, that upon the hearing and determining of any indictment or information under sections four, five, and six of this Act, the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses.

By s. 14, the expression "municipal authority" in this Act means any of the following authorities, that is to say, the Metropolitan Board of Works, the Common Council of the City of London, the Commissioners of Sewers of the City of London, the town and council of any borough for the time being subject to the 5 & 6 Will. 4, c. 76 (see *ante*, p. 250), and any Act amending the same, any commissioners, trustees, or other persons invested by the local Act of Parliament, with powers of improving, cleansing, lighting, or paving any town, and any Local Board.

Any municipal authority or company or contractor who has obtained authority by or in pursuance of any general or local Act of Parliament to supply the streets of any city, borough, town, or place, or of any part thereof, with gas, or which is required by or in pursuance of any general or local Act of Parliament, to supply water on demand to the inhabitants of any city, borough, town, or place, or any part thereof, shall for the purpose of this act be deemed to be a municipal authority or company or contractor upon whom is imposed by Act of Parliament the duty of supplying such city, borough, town, or place, or part thereof, with gas or water.

By s. 15, the word "maliciously" used in reference to any offence under this Act shall be construed in the same manner as it is required by sect. 58 of the Malicious Injuries to Property Act, 24 & 25 Vict. c. 97 (*ante*, p. 289), to be construed in reference to any offence committed under that act.

By s. 16, nothing in this Act shall apply to seamen or to apprentices to the sea service.

*DEAD BODIES.

[*445]

OFFENCES RELATING TO.

ALTHOUGH larceny cannot be committed of a dead body, no one having any right of property therein, yet it is an offence to remove a body without lawful authority ; and such offence is punishable with fine and imprisonment as a misdemeanor.¹ An indictment charged (*inter alia*) that the prisoner, a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. It being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon this count : and it was considered that this was so clearly an indictable offence that no case was reserved. *R. v. Gilles*, 1 Russ. Cri. 611, 5th ed. ; Russ. & Ry. 366 (n). So to take up a dead body, even for the purpose of dissection, is an indictable offence. Where, upon an indictment for that offence, it was moved in arrest of judgment, that the act was only one of ecclesiastical cognizance, and that the silence of the older writers on crown law showed that there was no such offence cognizable in the criminal courts, the court said that common decency required that the practice should be put a stop to ; that the offence was cognizable in a criminal court as being highly indecent, and *contra bonos mores* ; that the purpose of taking up the body for dissection did not make it less an indictable offence, and that as it had been the regular practice at the Old Bailey in modern times, to try charges of this nature, the circumstance of no writ of error having been brought to reverse any of those judgments, was a proof of the universal opinion of the profession upon this subject. *R. v. Lynn*, 2 T. R. 733 ; 1 Leach, 497 ; see also *R. v. Cundrick*, Dowl. & Ry. N. P. C. 13. And it makes no difference what are the motives of the person who removes the body ; the offence being the removal of the body without lawful authority. See *R. v. Sharpe*, Dear. & B. 160 ; 26 L. J., M. C. 43 ; where the defendant, from motives of filial affection, had removed the corpse of his mother from its burying place. The defendant had in this case committed a trespass against the owner of the soil of the burying place ; but *quære* whether, if no such trespass was committed, the offence might not be still complete.

The burial of the dead is the duty of every parochial priest and minister, and if he neglect or refuse to perform the office, he may, by the express words of canon 86, be suspended by the ordinary for three months ; and if any temporary inconvenience arise, as a nuisance,

¹ See *Commonwealth v. Loning*, 8 Pick. 370. S.

from the neglect of the interment of the corpse, he is punishable also by the temporal courts by indictment or information. *Per Abney, J., Andrews v. Cawthorne*, Willes, 536. But see now the "Burials Act," 43 & 44 Vict. c. 41, s. 1.

To bury the dead body of a person who has died a violent death, before the coroner has sat upon it, is punishable as a misdemeanor, *446] *and the coroner ought to be sent for, since he is not bound *ex officio* to take the inquest without being sent for. *R. v. Clerk*, 1 Sulk. 377; *Anon.*, 7 Mod. 10. And if a dead body in a prison or other place, upon which an inquest ought to have been taken, is interred, or is suffered to lie so long that it putrefies before the coroner has viewed it, the gaoler or township shall be amerced. *Hawk. P. C. b. 2, c. 9, s. 23*; see also *Sewell's Law of Coroner*, p. 29.

The preventing a dead body from being interred has likewise been considered an indictable offence. Thus the master of a workhouse, a servant, and another person, were indicted for a conspiracy to prevent the burial of a person who died in a workhouse. *R. v. Young*, cited 2 T. R. 734. Digging up a disused burial-ground for building purposes is a misdemeanor at common law. *R. v. Jacobson*, 14 Cox, C. C. 522. To leave a dead body exposed in a highway is an indictable nuisance. *R. v. Clark*, 15 Cox, C. C. 171, see *post*, tit. "Nuisance."

Provision is made for the interment of dead bodies which may happen to be cast on shore, by the 48 Geo. 3, c. 75.

By the 2 & 3 Will. 4, c. 75, s. 7, it is provided that "it shall be lawful for any executor, or other party, having lawful possession of the body of any deceased person, and not being an undertaker, or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination." Section 8 provides for the party lawfully in the possession of a dead body directing and permitting anatomical examination; where the deceased shall, during his life, have directed it, "unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination." By section 10, professors of anatomy, and the other persons therein described, being duly licensed, are not liable to punishment for having in their possession human bodies according to the provision of the act. The 18th section of this statute makes offences against the act misdemeanors, and subjects offenders to be punished by imprisonment not exceeding three months, or by fine not exceeding fifty pounds.

In *R. v. Feist, Dears. & B. C. C. 590* ; 27 L. J., M. C. 164, the defendant was master of a workhouse, and had lawful possession of the bodies of deceased paupers. He was in the habit of having the appearance of a funeral gone through with a view of preventing the relatives requiring that the bodies should be buried without being subject to anatomical examination, and the jury found that but for that deception the relatives would have required the bodies to be so buried. The bodies, instead of being buried, as was supposed by the relatives, were delivered to an hospital for the purpose of undergoing anatomical examination, and for this service the master received from the hospital a sum of money. The prisoner was found guilty of an offence at common law in disposing of a body for the purpose of dissection ; but the question was reserved, whether the defendant was *protected by s. 7 of the above act. The Court of Criminal Appeal held that he was, as the requirement mentioned in that [*447 section had not been actually made. Willes, J., pointed out that this was an offence specially provided for by the 7 & 8 Vict. c. 101, s. 31.

It would seem that cremation is illegal. *Williams v. Williams*, 20 Ch. D. 659 ; 61 L. J. Ch. 388. But Mr. Justice Stephen, at the Glamorganshire assizes, February, 1884, charged the grand jury to the contrary effect. *R. v. Price*, 12 Q. B. D. 247 ; 39 L. J., M. C. 51 ; "If the cremation is intended to prevent a coroner's inquisition it is a misdemeanor. See *Reg. v. Stephenson*, L. R. W. N. July 5, 1884, p. 160."

So much of the 9 Geo. 4, c. 31, as relates to the dissection of dead bodies of persons condemned to death is repealed by the 2 & 3 Will. 4, c. 75, s. 7.

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*DEER—OFFENCES RELATING TO.

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Stealing deer. The former statutes with regard to the offence of stealing deer are repealed by the act of 7 & 8 Geo. 4, c. 27, and the law upon the subject is now comprised in the 24 & 25 Vict. c. 96.

By s. 12, "whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever having been previously convicted of any offence relating to deer for which a pecuniary penalty shall have been imposed, by this or by any former act of parliament, shall afterwards commit any of the offences herein-before enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping."

By s. 13, "whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping."

The word "deer," in this statute, includes all ages and both sexes; "a fawn," therefore. *R. v. Strange*, 1 Cox, C. C. 58.

By s. 14 of the above statute, suspected persons found in possession of venison, etc., and not satisfactorily accounting for the same, are rendered liable to penalty not exceeding 20*l*.

By s. 15, persons setting snares or engines for the purpose of taking or killing deer, or destroying the fences of land where deer shall be kept, on conviction before a justice, shall forfeit a sum not exceeding 20*l*.

Power of deer-keepers, etc., to seize guns. By s. 16 of the above statute, "if any person shall enter into any forest, chase, or purlieu,

whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, *snare, or carry away any deer, it shall be lawful for every [*449 person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun, fire-arms, snare, or engine, in his possession, and any dog there brought for hunting, coursing, or killing deer; and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place, to which he may have escaped therefrom, for the use of the owner of the deer.

Assaulting deer-keepers or their assistants. By the same section "if any such offender (*vide supra*) shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping."

Pulling a deer-keeper to the ground, and holding him there while another person escapes, is not a beating of the deer-keeper within this section. There must be a beating in the popular sense of the word; proof of a bare legal battery only is insufficient. *Per Maule, J., in R. v. Hale*, 2 C. & K. 326, 61 E. C. L.

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*DISTURBING PUBLIC WORSHIP.

By the 52 Geo. 3, c. 155 (E.), s. 12, "if any person or persons, at any time after the passing of this act, do and shall wilfully and maliciously and contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this act, or any former act or acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof, before any justice of the peace by two or more credible witnesses, shall find two sureties, to be bound by recognizances in the penal sum of fifty pounds, to answer such offence, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said quarter sessions, shall suffer the pain and penalty of forty pounds.¹

Upon an indictment found at the sessions under the Toleration Act, 1 Will. & M. c. 18, for disturbing a dissenting congregation, it was held that, upon conviction, each defendant was liable to the penalty of twenty pounds imposed by that statute. *R. v. Hube*, 5 T. R. 542; *Peake*, N. P. 180.

This offence may be tried at the sessions, 52 Geo. 3, c. 155, s. 12, *supra*, or in the King's Bench, or at the assizes, if removed by *certiorari* from the sessions. *R. v. Hube*, *supra*; *R. v. Wadley*, 4 M. & S. 508.

Now, however, the 23 & 24 Vict. c. 32 (E. & I.), which abolishes the jurisdiction of the ecclesiastical courts in cases of brawling, provides for the recovery in a summary manner of a penalty of not more than five pounds for any disturbance in any recognized place of worship whatsoever, whether during the celebration of divine service or not. And it seems that any disturbance of a congregation assembled according to law would be indictable at common law (1 Hawk. c. 28, s. 23; 1 Keb. 491), more particularly if arising out of any previous conspiracy for the purpose. See, moreover, 1 Gab. Crim. Law of Ireland, 294, 295.

As to assaults on clergymen, see 24 & 25 Vict. c. 100, s. 56, *supra*, p. 231.

¹ Maliciously disturbing or interrupting a lawful assembly, such as a meeting of school directors, is indictable as a misdemeanor at common law. *Campbell v. Commonwealth*, 59 Pa. St. 266. S.

For indictments under statutes, see *Commonwealth v. Jennings*, 3 Grat. (Va.) 624; *Kinney v. State*, 38 Ala. 224; *Williams v. State*, 3 Sneed, (Tenn.) 313; *Wood v. State*, 11 Tex. App. 318; *Hollingsworth v. State*, 5 Sneed, (Tenn.) 518.

•DOGS.

[*451]

Stealing dogs. By the 24 & 25 Vict. c. 96, s. 18, "Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labor, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding twenty pounds, as to the said justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labor."

Having possession of stolen dogs. By s. 19, "Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen, or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money, not exceeding twenty pounds, as to such justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labor."

Taking money to restore dogs. By s. 20, "Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labor."

A dog is not a chattel within the meaning of the statute relating to obtaining property by false pretences; *R. v. Robinson*, 1 Bell, C. C. 34; 28 L. J., M. C. 58.

*452] *DWELLING-HOUSE—OFFENCES RELATING TO.

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BURGLARY, or the offence of breaking a dwelling-house by night, has already been treated of; so also has the setting fire to a dwelling-house, under the title **Arson**; the offence we are now to consider is breaking and entering a dwelling-house by day. The offence was formerly provided for by several statutes, which were repealed and consolidated by the 7 & 8 Geo. 4, c. 29. This statute is also repealed, and the Act now in force is the 24 & 25 Vict. c. 96.

What building within the curtilage to be deemed part of a dwelling-house. By s. 53, "no building although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other."

Breaking and entering building within the curtilage and committing a felony. By s. 55, "whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provisions hereinbefore mentioned, or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

*453] *Breaking and entering a house, warehouse, etc., and committing any felony. By s. 56, "whosoever shall break

and enter any dwelling-house, school-house, shop, warehouse, or counting-house, and commit any felony therein, or, being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Breaking and entering a house, place of divine worship, shop, warehouse, etc., with intent to commit felony. By s. 57, "who-soever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Stealing in a dwelling-house to the value of 5*l*. By s. 60, "who-soever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l*. or more, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Stealing in a dwelling-house with menaces. By s. 61, "who-soever shall steal any chattel, money, or valuable security in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable" to precisely the same punishment as in the last section.

Riotously pulling down dwelling-houses. See tit. "Riot."

Proof of the breaking and entering. See tit. "Burglary," *supra*, pp. 360, 367, 386.

Proof of the premises being a dwelling-house. See tit. "Burglary," p. 367, and tit. "Arson," p. 290.

Proof of stealing in a dwelling-house. The offence of stealing in a dwelling-house was held not to have been committed in *R. v. Campbell*, 2 *Lea*, 564 ; 2 *East*, P. C. 644 ; where the occupier of the

house gave the prisoner a bank-note to get changed, and which the prisoner stole. So when the prisoner obtained a sum of money from the prosecutor, in the dwelling-house of the latter, by *ring-dropping*, this also was held not to be within the statute. The judges were of opinion, *454] *that to bring a case within the statute, the property must be under the protection of the house, deposited there for safe custody, as the furniture, money, plate, etc., kept in the house, and not things immediately under the eye or personal care of some one who happens to be in the house. *R. v. Owen*, 2 East, P. C. 645; 2 Leach, 572. The same point was ruled in subsequent cases.

On the other hand it was held, on a case reserved, that stealing in a dwelling-house to the value of 5*l.* by the owner of the house was within the repealed statute of the 7 & 8 Geo. 4, c. 29, s. 12. *R. v. Bowden*, 2 Moo. C. C. 285.

Where a lodger invited the prosecutor to take part of his bed, without the knowledge of his landlord, and stole his watch from the bed-head, it was held by the judges that he was properly convicted of stealing in a dwelling-house. *R. v. Taylor*, R. & R. 418. So where goods were left by mistake at a house in which the prisoner lodged, and were placed in his room, and carried away by him, they were held to be within the protection of the house. *R. v. Carroll*, 1 Moo. C. C. 89. So if a man on going to bed put his clothes and money by his bedside, these are under the protection of the dwelling-house, and not of the person. *R. v. Thomas*, Car. Sup. 295. So where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while the man was asleep, Parke, B., and Patteson, J., after referring to *R. v. Taylor*, *supra*, were of opinion that the prosecutor having been asleep when the watch was taken by the prisoner, it was sufficiently under the protection of the house to bring it within the statute. *R. v. Hamilton*, 8 C. & P. 49, 34 E. C. L. It would appear that had the prosecutor been awake instead of asleep, in Taylor's case, the property was sufficiently within his personal control to render the stealing of it a stealing from the person, and that an indictment under the above enactment would not have been sustainable. See the note to *R. v. Hamilton*, *supra*, by Greaves, 2 Russ. Cri. 65 (*j*), 5th ed. 855 (*n*). But where a person put money under his pillow, and it was stolen whilst he was asleep, this was held not a stealing of money in the dwelling-house within the meaning of the repealed statute, 12 Anne, c. 7. 2 Stark. C. P. 467; *R. v. Challenor*, Dick. Quar. Sess. 245, 5th ed.; 2 Russ. Cri. 66, 5th ed.

It is a question for the court, and not for the jury, whether goods are under the protection of the dwelling-house, or in the personal care of the owner. *R. v. Thomas*, *supra*.

Proof of the value of the goods stolen. It must appear not only that the goods stolen were of the value of 5*l.*, but likewise that goods to that value were stolen upon one occasion, for a number of distinct larcenies cannot be added together to constitute a compound statutable

larceny. Where it appeared that the prisoner had purloined his master's property to a very considerable amount, but it was not shown that he had ever taken to the amount of 40s. at any one particular time, upon an indictment under the 12 Anne, c. 7, the court held that the property stolen must not only be in the whole of such a value as the law requires to constitute a capital offence, but that it must be stolen to that amount at one and the same time; that a number of distinct petty larcenies could not be combined so as to constitute grand larceny, nor could any distinct number of grand larcenies be added together, so as to constitute a capital offence. *R. v. Petrie*, 1 Leach, 295. And the same was ruled by Ashhurst, J., in a *subsequent case. *R. v. Farley*, 2 East, P. C. 740. But it may vary the consideration, if the property of several persons lying together in one bundle or chest, or even in one house, be stolen together, at one time; for there the value of all may be put together, so as to make it grand larceny, or to bring it within a statute which aggravates the punishment, for it is one entire felony. 2 East, P. C. 470. And where, under the statute of Anne, the property was stolen at one time to the value of 40s., and a part of it only, not amounting to 40s., was found upon the prisoner, the court left it to the jury to say whether the prisoner had not stolen the remainder of the property, which the jury accordingly found. *R. v. Hamilton*, 1 Leach, 348; 2 Russ. Cri. 67, 5th ed.

Where the prisoner, who was in prosecutor's service, stole a quantity of lace in several pieces, which were not separately worth 5*l.*, and brought them all out of his master's house at one time, Bolland, B., held that the offence was made out, although it was suggested that the prisoner might have stolen the lace a piece at a time. *R. v. Jones*, 4 C. & P. 217, 19 E. C. L. The learned baron mentioned a case tried before Garrow, B., where it appeared that the articles, which were separately under the value of 5*l.*, were in fact stolen at different times, but were carried out of the house all at once, and the latter learned judge held, after much consideration, that as the articles were brought out of the house all together, the offence (which was then capital) was committed.

See a similar case as to injuries to trees, *post*, tit. "Trees and other vegetable productions."

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*ELECTIONS—OFFENCES AT.

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Offences at Parliamentary elections.¹ By the Ballot Act, 1872 (35 & 36 Vict. c. 33) it is enacted (s. 3) with respect to Parliamentary elections, that "Every person who

(1) "Forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the returning officer any nomination paper knowing the same to be forged; or

(2) "Forges or counterfeits or fraudulently defaces or fraudulently destroys any ballot paper, or the official mark on any ballot paper; or

(3) "Without due authority supplies any ballot paper to any person; or

(4) "Fraudulently puts into any ballot-box any paper other than the ballot paper which he is authorized by law to put in; or

(5) "Fraudulently takes out of the polling station any ballot paper; or

(6) "Without due authority destroys, takes, opens, or otherwise interferes with any ballot-box or packet of ballot papers then in use for the purposes of the election, shall be guilty of a misdemeanor, and be liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labor, and if he is any other person, to imprisonment for any term not exceeding six months with or without hard labor. Any attempt to commit any offence specified in this section shall be punishable in the manner in which the offence itself is punishable. In any indictment or other prosecution for an offence in relation to the nomination papers, ballot-boxes, ballot papers and marking instruments at an election, the property in such papers, boxes, and instruments may be stated to be in the returning officer at such election, as well as the property in the counterfoils."

There does not appear to be any provision whatever in this act which provides for the payment of the expenses of the prosecution with respect to the above offences.

At the trial of an indictment charging the prisoner with having fraudulently placed papers purporting to be, but to his knowledge

¹ On a trial for carrying arms near an election poll, where the defence was that he had been appointed a special police officer, and therefore had a right to carry arms, it was held that a period of five months since the appointment was made, raised a presumption that the emergency had ceased, and with it the authority and immunities of a peace officer. *Shell v. State*, 4 Tex. App. 171.

not being, ballot papers in the ballot-box, the counterfoils, voting papers, and marked register, produced under order duly made by authority of the statute, may be given in evidence, and the face of the voting papers may be inspected so as to show how the votes *appeared to have been given. *R. v. Beardsall*, 1 Q. B. D. [*457 452; 45 L. J., M. C. 157.

By the Corrupt Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), offences at elections have been more clearly defined and extended, and stringent regulations affecting the conduct of elections have been passed. Many of these offences are punishable upon summary conviction, and are not within the scope of this work.

Most of the offences punishable upon indictment, such as Corrupt Practices, etc., etc., will be found treated of, *ante*, tit. "Bribery," and the sections relating to legal proceedings under the act are there set out. The offence of personation at elections will be found treated of, *post*, tit. "False Personation."

By s. 41, sub-s. 4, If any person makes any agreement or terms, or enters into any undertaking in relation to the withdrawal of an election petition, and such agreement, terms, or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are, whether lawful or unlawful, not mentioned in the aforesaid affidavits (see the former part of the section), he shall be guilty of a misdemeanor, and shall be liable, on conviction or indictment, to imprisonment for a term not exceeding twelve months, and to a fine not exceeding 200*l*.

Offences at municipal elections. By 45 & 46 Vict. c. 50, s. 74, (1) If any person forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the town clerk any forged nomination paper, knowing it to be forged, he shall be guilty of a misdemeanor, and shall be liable to imprisonment for any term not exceeding six months, with or without hard labor. (2) An attempt to commit any such offence shall be punishable as the offence is punishable.

Bribery at elections. See *ante*, tit. "Bribery."

Personation at elections. See *post*, tit. "False Personation."

False declarations at elections. See *post*, tit. "False Declarations."

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***EMBEZZLEMENT.**

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Embezzlement by clerks or servants. By the 24 & 25 Vict. c. 96, s. 68, "whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same

from his master or employer, although such chattel, money, and security, was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Embezzlement by persons in the queen's service, or by the police. By s. 70, "whosoever being employed in the public service of her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, and in trusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle any chattel, money, or valuable security, which shall be intrusted to, or received, or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service, shall be deemed to have feloniously stolen the same from her Majesty, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three [now five] years, or to be imprisoned for any term not exceeding two years."

Venue in embezzlement by persons in the queen's service, or by the police. By the same section every offender against this provision "may be dealt with, indicted, tried, and punished, either in the county or place in which he shall be apprehended, or be in custody, or in which he shall have committed the offence."

Form of warrant of commitment and indictment in the same cases. By the same section, in every case of embezzlement under this section "it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in her Majesty."

Distinct acts of embezzlement may be charged in the same indictment. By s. 71, "for preventing difficulties in the prosecution of offenders in any case of embezzlement, or fraudulent application or disposition hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against her Majesty, or against the same master or em-

ployer, within the space of six months from the first to the last of such acts."

***460] *Description of property in the indictment.** By the same section, in every indictment for embezzlement "where the offence shall relate to any money or any valuable security it shall be sufficient to allege the embezzlement, or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled, or fraudulently applied or disposed of, any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved."

Where part of the property is to be returned. By the same section an indictment for embezzlement of "money" is declared to be sustained against the prisoner "if he shall be proved to have embezzled or fraudulently applied or disposed of, any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly."

Persons indicted for embezzlement not to be acquitted if the offence turn out to be larceny, and vice versa. By s. 72, "if upon the trial of any person indicted for embezzlement, or fraudulent application or disposition, as aforesaid, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application, or disposition, as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application, or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application, or disposition; and no person so tried for embezzlement, fraudulent application, or disposition, or larceny as aforesaid, shall be liable to be

afterwards prosecuted for larceny, fraudulent application, or disposition, or embezzlement, upon the same facts."

Summary jurisdiction. By the 42 & 43 Vict. c. 49, embezzlement by a clerk or servant, where such clerk or servant is a young person who consents to be tried summarily, or is an adult pleading guilty, may be dealt with summarily, and in the case of an adult consenting where the value of the property does not exceed 40s., may be dealt with in like manner.

***Embezzlement by officers of the banks of England or Ireland.** By 24 & 25 Vict. c. 96, s. 73, "whosoever being [*461 an officer or servant of the governor and company of the Bank of England, or of the Bank of Ireland, and being intrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or with any security, money, or other effects of or belonging to the said governor and company, or having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest or money, or any security, money, or other effects of any other person, body politic or corporate, lodged or deposited with the said governor and company, or with him as an officer or servant of the said governor and company, shall secrete, embezzle, or run away with, any such bond, deed, note, bill, dividend, or other warrant, security, money, or other effects, as aforesaid, or any part thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [now five] years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Embezzlement of property of a trade union. See tit. "Larceny."

Embezzlement of property by partners. See tit. "Larceny."

Embezzlement by officers of savings banks. See 26 & 27 Vict. c. 87, s. 9.

Embezzling warehoused goods. By the 39 & 40 Vict. c. 36, s. 85, it is enacted that "if any goods shall be taken out of any warehouse without due entry, the occupier of such warehouse shall forthwith pay the duties due upon such goods; and every person taking out any goods from any warehouse without payment of duty, or who shall aid, assist, or be concerned therein, and every person who shall destroy or embezzle any goods duly warehoused, shall be deemed guilty of a misdemeanor, and shall, upon conviction, suffer the punishment by law inflicted in case of misdemeanor; but if such person shall be an officer of customs or excise not acting in the due execution of his duty, and shall be prosecuted to conviction by the

importer, consignee, or proprietor of such goods, no duty shall be payable for or in respect of such goods, and the damage occasioned by such destruction or embezzlement shall, with the sanction of the Commissioners of the Treasury, be repaid or made good to such importer, consignee, or proprietor by the Commissioners of Customs."

Embezzlement of naval and military stores. See *post*, tit. "Naval and Military Stores."

Embezzlement of post letters. See *post*, tit. "Post Office."

Embezzling woollen, flax, mohair, silk, and other manufactures. By the 6 & 7 Vict. c. 40, various offences, partaking of the nature of embezzlement, are provided for with respect to manufactures. *R. v. Edmundson*, 28 L. J., M. C. 213.

*462] ***Falsification of accounts.** By the 38 Vict. c. 24, s. 1, "if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or shall wilfully and with intent to defraud, make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanor, and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labor for any term not exceeding two years."

By s. 2, "it shall be sufficient in any indictment under this act to allege a general intent to defraud without naming any particular person intended to be defrauded."

By s. 3, this act is to be read as one with the 24 & 25 Vict. c. 96.

Interpretation. As to the meaning of the term "valuable security," see 24 & 25 Vict. c. 96, s. 1, *infra*, tit. "Larceny."

What persons are within the statute. The question whether or not the prisoner comes within the meaning of the statute must be submitted to the jury, the judge directing them what facts are sufficient to determine this question in the negative or affirmative. See *R. v. Negus*, L. R., 2 C. C. 34; 42 L. J., M. C. 62.

The 24 & 25 Vict. c. 96, s. 68, comprises any person "being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant." The words of the 7 & 8 Geo. 4, c. 29, s. 47, were the same; and under that statute it was always considered that there must be something more than a mere casual temporary employment for the particular occasion when the offence is committed. Indeed,

under that statute something more than this was required, as will be seen presently, p. 470.

General cases. As to when the relation which is required by the statute is created, it has been held that a female servant is within the statute; *R. v. Smith*, Russ. & Ry. 267; so, likewise, is an apprentice; *R. v. Mellish*, Russ. & Ry. 80.

Officer not servant. The clerk or servant of a corporation, although not appointed under the common seal, is a servant within the statute. *R. v. Beacall*, 1 C. & P. 457, 12 E. C. L.; 2 Russ. Cri. 343, 5th ed.; *Williams v. Stott*, 1 Crompt. & M. 689. The clerk of a chapelry, who receives the sacrament money, is not the servant either of the curate, or of the chapel-wardens, or of the poor of the township, within the meaning of the act. *R. v. Burton*, 1 Moo. C. C. 237. The schoolmaster of a charity was held not to be the servant of the treasurer or committee. *R. v. Nettleton*, 1 Moo. C. C. 259. A person was chosen and sworn in at a court leet held by a corporation, as chamberlain of certain commonable lands. The duties of the chamberlain, who received no remuneration, were to collect moneys from the commoners and other persons using the commonable lands, to employ the moneys so received in keeping the common in order, and to account for the balance at the end of the year to two members of the corporation. *The Court of Exchequer held that this person was not within the statute. *Williams v. Stott*, *ubi supra*. [*463]

A person employed by the overseers of the poor under the name of their accountant and treasurer is a clerk within the statute. Thus, where the prisoner had acted for many years for the overseers of the parish of Leeds, at a yearly salary, under the name of their accountant and treasurer, and as such had received and paid all the money receivable or payable on their account, rendering to them a weekly statement, purporting to be an account of moneys so received and paid, he was held to be rightly convicted of embezzlement. *R. v. Squire*, Russ. & Ry. 349; 2 Stark. 394, 3 E. C. L. So a person who acted as clerk to parish officers at a yearly salary, voted by the vestry, was convicted of embezzlement. *R. v. Tyers*, Russ. & Ry. 402. And an extra collector of poor-rates, paid out of the parish funds, by a percentage, was held by Richardson, J., to be a clerk of the church-wardens and overseers, so as to support an indictment for embezzlement. *R. v. Ward*, Gow. 168. The law on this subject is simplified by the 12 & 13 Vict. c. 103, s. 15, which, after reciting that difficulty had arisen in cases of larceny or embezzlement as to the proper description of the office of collectors of poor-rates and assistant-overseers, enacts that "in respect of any indictment or other criminal proceeding, every collector or assistant-overseer appointed under the authority of any order of the poor-law commissioners, or the poor-law board, shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be

sufficient to state any such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified." See *R. v. Carpenter*, L. R., 1 C. C. R. 29 ; 35 L. J., M. C. 169. A similar provision is contained in some local acts. An under-bailiff of a county court is not the servant of the high-bailiff, though employed by him to make levies by virtue of the processes of the court. *R. v. Glover*, L. & C. 466 ; 33 L. J., M. C. 169.

In *R. v. Tongue*, 30 L. J., M. C. 49, the secretary of a money club, hired at a salary, was held to be within the old statute.

The treasurer of a friendly society cannot be indicted for embezzlement, because he is an accountable officer and not a servant. By the Friendly Societies Act, 18 & 19 Vict. c. 63 (now repealed, but there is a similar provision in the 38 & 39 Vict. c. 60, s. 16), the moneys of the society were vested in trustees. The treasurer received no salary, and had to give security upon which the trustees were empowered to sue. He had to account to the trustees when required, and to pay over the balance. *R. v. Tyree*, L. R., 1 C. C. R. 177 ; 38 L. J., M. C. 58.

Servant of illegal society. Where a society, in consequence of administering to its members an unlawful oath, was an unlawful combination and confederacy under the statutes of 37 Geo. 3, c. 123 ; 39 Geo. 3, c. 79 ; 52 Geo. 3, c. 104 ; and 57 Geo. 3, c. 19 ; it was held by Mirehouse, C. S. (after consulting Bosanquet and Coleridge, JJ.), that a person charged with embezzlement as clerk and servant to such society could not be convicted. *R. v. Hunt*, 8 C. & P. 642, 34 E. C. L. And see *Milligan v. Wedge*, *infra*. But where a society is legal, though some of its rules are void as being in restraint of trade, *the servant of the society may be convicted of embezzlement. *464] *R. v. Stainer*, L. R., 1 C. C. R. 230 ; 39 L. J., M. C. 54 ; and as to trade unions, it is now enacted by the 34 & 35 Vict. c. 31 s. 2, that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, or s. 3, so as to render void or voidable any agreement or trust, and see *post*, tit. "Larceny."

Employed for single act. The prisoner was a carrier whose *only* employment was to carry unsewed gloves from a glove manufacturer at A. to glove sewers who resided at B., to carry them back when sewed, and to receive the money for the work and pay it to the glove sewers, deducting his charge. On several occasions he appropriated the money which he received on behalf of the sewers. It was held that he was not the servant of the sewers so as to be guilty of embezzlement ; that his offence was a breach of trust, being a mere bailee of the money. *R. v. Gibbs, Dears.* C. C. 445 ; 24 L. J., M. C. 63. Where the relation of master and servant arises, it is immaterial that the sum embezzled was obtained in the conduct of a single transaction out of the ordinary course of service. *R. v. Smith*, R. & R. 516,

R. v. Tongue, *infra*, and *R. v. Spencer*, R. & R. 299, and it is to be observed that the words "by virtue of his employment" are omitted in the statute now in force. See *infra*, p. 470. But where the prisoner's real employment was to get orders on commission, and his employer himself got an order and asked the prisoner to get the money for that particular order, which he did and appropriated it, Russell Gurney, Recorder, ruled that the prisoner was a mere volunteer. *R. v. Mayle*, 11 Cox, C. C. 150.

When a drover keeping cattle for a farmer at Smithfield was ordered to drive the cattle to a purchaser and receive the money, which he did, and appropriated it, the judges were unanimously of opinion that he was a servant within the meaning of the act. *R. v. Hughes*, 1 Moo. C. C. 370. But in *Milligan v. Wedge*, 12 Ad. & El. 737, 40 E. C. L., where the buyer of a bullock employed a licensed drover to drive it from Smithfield to his slaughter-house, and it appeared by the laws of the city of London that it was unlawful to employ any other than a licensed drover, Coleridge, J., on a question raised as to the liability of the owner of the bullock for negligence in driving it, held that no relation of master and servant was created between him and the drover. In the same case it appeared that the drover had intrusted the bullock to the care of a boy, not a licensed drover, and it was held that he also was not the servant of the owner.

Agent not servant. The prosecutors, who were manure manufacturers, engaged the prisoner, who kept a refreshment house at B., to get orders which they supplied from their stores. The prisoner was to collect the money, and pay it at once to them, and send a weekly account, and was called agent for the B. district. Subsequently the prosecutors sent large quantities of manure to stores at B., which were under the control of the prisoner, who took them in his own name and paid the rent. The prisoner supplied orders from these stores, but the first-mentioned mode of supplying orders was not abandoned. The prisoner received a salary of 1*l.* per annum besides commission. It was held that the relation was one of principal and *agent, and that the prisoner was not guilty of embezzlement. [*465 *R. v. Walker, Dears. & B. C. C. 606.*

In *R. v. May*, 1 L. & C. 13; 30 L. J., M. C. 81, the prosecutors had told the prisoner that they would not appoint him as their agent, but that for all business he did for them they would pay him a commission. It does not appear that he transacted business on more than two occasions for the prosecutors, and the court held that the prisoner could not be convicted of embezzlement under the statute. There was here, it is true, the additional circumstance that, even if the prisoner had been a clerk or servant, he was not employed to receive money, and Williams, J., said, in *R. v. Tite*, *infra*, p. 466, that this circumstance influenced his judgment, but without that circumstance the case seems a clear one.

The prisoner was a member of a friendly society, and one of a joint committee appointed by his own and another society to manage an ex-

cursion of the members by railway. He was to sell the tickets, and to pay over the money received to another person, but he was to have no remuneration. He fraudulently appropriated the money, and was held to be wrongly convicted of embezzlement. The case of *R. v. May* was cited for the prisoner, and it was contended that the prisoner was under no control and unremunerated, and was therefore not a servant. The case appears, however, to have been decided partly upon the ground that the prisoner was a joint owner of the tickets and of the money to arise from the sale of them. *R. v. Bren*, 1 L. & C. 346; 33 L. J., M. C. 59; and in this view of the case the 31 & 32 Vict. c. 116, s. 1, would apply; see as to this *infra*; and see *post*, tit. "Larceny."

In *R. v. Bowers*, L. R. 1, C. C. R. 41; 35 L. J., M. C. 206, however, it was held that a person who is employed to get orders for goods and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, and to dispose of his time as he thinks best, being paid by a commission on the goods sold, is not a clerk or servant. In that case the prisoner had first received a salary and a commission under a written agreement. He then engaged in trade on his own account, and a subsequent agreement was come to by which the salary was stopped and the commission continued; and it was said by the court that after that day he was not under the daily orders and control of his employers. The above case was confirmed in *R. v. Negus*, L. R. 2 C. C. 34; 42 L. J., M. C. 62; see also *R. v. Hall*, 13 Cox, C. C. 149.

Where the prosecutor said, "I paid the prisoner commission but no salary; he was not obliged to be at my office at any particular time, excepting on Friday and Saturday to account for what money he had received for me; I did not give the prisoner directions to go to any particular place for orders; he went where he pleased," it was held that he was not a clerk or servant. *R. v. Marshall*, 11 Cox, C. C. 490, C. C. R. But where the prisoner was bound by the terms of his agreement "diligently to employ himself in going from town to town and soliciting orders," he was ruled by Lush, J., to be a clerk or servant. That learned judge, in remarkably clear language, thus states the law: "If a person says to another carrying on an independent trade, 'If you get any orders for me I will pay you a commission,' and that person receives money and applies it to his own use, he is not a 'clerk or servant,' but if a man says 'I employ you and will pay you, not by salary, but by commission,' *then the person employed is a servant." *R. v. Turner*, 11 *466] Cox, C. C. 551.

A person who acts as a traveller for various mercantile houses, takes orders and receives moneys for them, and is paid by a commission, is *clerk* within the statute. The prisoner was indicted for embezzling the property of his employers, Stanley & Co. He was employed by them and other houses as a traveller, to take orders for goods, and to collect money for them from their customers. He did not live in the house with them. He was paid by a commission of five per cent. on all

goods sold, whether he received the price or not, provided they proved good debts. He had also a commission upon all orders that came by letter, whether from him or not. He was not employed as a clerk in the counting-house, nor in any other way than as above stated. Stanley & Co. did not allow him anything for the expenses of his journeys. Having been convicted of embezzling money, the property of Stanley & Co., the judges, on a case reserved, held the conviction right. *R. v. Carr*, Russ. & Ry. 198. This decision is affirmed by *R. v. Tite*, 1 L. & C. 29; 30 L. J., M. C. 142.

Part owners and sharers in profits. In *R. v. Atkinson*, 2 Moo. C. C. 278, it was held that a clerk to a joint-stock banking company, established under 7 Geo. 4, c. 46, might be convicted of embezzling the money of the company, notwithstanding that he was a shareholder.

The allowance of part of the profit on the goods sold will not prevent the character of servant from arising. The prisoner was employed to take coals from a colliery and sell them, and bring the money to his employer. The mode of paying him was by allowing him two-third parts of the price for which he sold the coal, above the price charged at the colliery. It was objected that the money was the joint property of himself and his employer; and the point was reserved for the judges, who held that the prisoner was a servant within the act. They said that the mode of paying him for his labor did not vary the nature of his employment, nor make him less a servant than if he had been paid a certain price per chaldron or per diem; and as to the price at which the coals were charged at the colliery in this instance, that sum he received solely on his master's account as his servant, and by embezzling it he became guilty of larceny within the statute. *R. v. Hartley*, Russ. & Ry. 139. See also *R. v. Wortley*, *infra*. The prisoner was employed by the prosecutors, who were turners, and was paid according to what he did. It was part of his duty to receive orders for jobs, and to take the necessary materials from his master's stock to work them up, to deliver out the articles, and to receive the money for them; and then his business was to deliver the whole of the money to his masters, and to receive back, at the week's end, a proportion of it for working up the articles. Having executed an order, the prisoner received three shillings, for which he did not account. Being convicted of embezzling the three shillings, a doubt arose whether this was not a fraudulent concealment of the order, and an embezzlement of the materials; but the judges held the conviction right. *R. v. Higgins*, Russ. & Ry. 145. A partner in a firm, with the consent of the other partners, contracted to give his clerk one-third of his own share of the profits; it was held by Chambre, J., that he might be convicted of embezzlement. *R. v. Holmes*, 2 Lew. C. C. 256. The [*467] learned judge quoted on this occasion a case on the northern circuit, before Wood, B., in which the prisoner had been sent by one F., the owner of a coal vessel, with a cargo of coals. According to

the custom of the trade, F. was entitled to one-third of the freight, and the prisoner to two-thirds. The prisoner took the whole and was convicted of embezzlement. A large majority of the judges held the conviction right.

The prisoner was a cashier and collector to commission agents. He was paid partly by salary and partly by a percentage on the profits, but was not to contribute to the losses, and had no control over the management of the business. It was held that he was a servant and not a partner as between himself and his employers, whatever might be the case as between himself and third parties. *R. v. M'Donald*, 1 L. & C. 85.

The prisoner entered into the following agreement with the prosecutor:—"S. W. agrees to take charge of the glebe land of J. B. C., his wife undertaking the dairy, poultry, etc., at 15s. a week till Michaelmas, 1850; and afterwards at a salary of 25*l.* a year, and a third of the clear annual profit after all the expenses of rent rates, labor, and interest on capital, etc., are paid, on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given; at the expiration of which time the cottage to be vacated by S. W., who occupies it as bailiff in addition to his salary." It was held that this agreement created the relation of master and servant, and that the prisoner (S. W.) might be convicted of embezzlement. *R. v. Wortley*, 2 Den. C. C. 333; 21 L. J., M. C. 44.

A member of a properly certified friendly society, who was duly appointed secretary, receiving a salary and acting as treasurer for the society, but without being elected to that office, received, as treasurer, moneys due from the members, and gave correct receipts, but made false entries in the contribution or cash-book kept by him as secretary, and appropriated the difference. Counsel for the defence contended that it was a mere breach of trust. The prisoner was convicted of embezzlement, and the Court for Crown Cases Reserved held that the conviction was right. *R. v. Proud*, 1 L. & C. 971. But see *R. v. Marsh*, 3 F. & F. 523; and see also *R. v. Bren*, where Martin, B., said that in the case of *R. v. Proud* the property of the society was vested in trustees (1 L. & C. 346, *supra*, p. 465). Many of the difficulties as to part owners and sharers in profits would now be avoided by the 31 & 32 Vict. c. 116, s. 1.

What persons are within the statute—persons employed by several. In *R. v. Goodbody*, 8 C. & P. 665, 34 E. C. L., Parke, B., said, "I am of opinion that a man cannot be the servant of several persons at the same time, but is rather in the character of an agent. There is one case in which it has been held that a man may be servant of several at the same time, but I should like to have that question further considered." The question has been further considered, and the doubt here expressed no longer exists. See *infra*. In *R. v. Leach*, 3 Stark. 70, 3 E. C. L., the prisoner was in the employment of B. and R. as their book-keeper; while in this situation he received into his possession certain bank-notes, which were the private property of

B. Being indicted for embezzling the notes as the servant of B., it was objected that he *was the servant of the partners and not of individuals; but Bayley, J., held that he was the servant of [468 each, and the learned judge referred to the case of *R. v. Carr*, Russ. & Ry. 198, where it was held that a traveller employed by several houses might be indicted for embezzlement as the servant of any one house. In *R. v. Batty*, 2 Moo. C. C. 257, it was held that a person employed by A. B., to sell goods for him at certain wages might be convicted of embezzlement as the servant of A. B., though at the same time he was employed by other persons for other purposes.

A., being one of the proprietors of a Hereford and Birmingham coach, horsed it from Hereford to Worcester, and employed the prisoner to drive it when he did not drive it himself, the prisoner taking all the gratuities. It was the prisoner's duty on each day when he drove to tell the book-keeper at Malvern how much money he had taken, which the latter entered in a book; and then handed over to the prisoner the amount he had himself received. These two sums it was the duty of the prisoner to deliver to A., who was accountable to his co-proprietors. It was held by Patteson, J., that the prisoner by appropriating the money was guilty of embezzlement, that he was rightly described as a servant of A., and that the money was properly laid as the property of A. *R. v. White*, 8 C. & P. 742, 34 E. C. L., 2 Moo. C. C. 91.

A railway station was maintained at the joint expense of four companies, out of a fund contributed by them*in certain proportions; it was under the general management of a committee of eight persons, selected from the directors of the four companies. This committee appointed and paid all the officers and servants of the station, and, amongst others, the prisoner, who was a delivery clerk, whose duty it was to receive parcels at the station brought by trains belonging to any of the four companies, to deliver them, and receive the payments for carriage and delivery. The money so received it was his duty to pay over to the cashier, who then paid it over to the respective companies entitled thereto. The prisoner appropriated a part of the amount paid to him for the carriage and delivery of a parcel brought to the station by one of the four companies. It was held that the prisoner might be indicted either as the servant of the four companies, or of the eight directors forming the committee. *R. v. Bayley*, Dears. & B. C. C. 121; 26 L. J., M. C. 4. See also *R. v. Carr*, and *R. v. Tite*, *supra*, p. 466.

In whose employment. Sometimes there is little doubt that the person indicted is a clerk or servant, or employed in that capacity, but it is difficult to say precisely who his employer is.¹ This difficulty has frequently arisen with respect to the collectors of poor-rates and persons holding similar situations, and some cases on this subject will be found at p. 463; but the 12 & 13 Vict. c. 103, s. 15, *supra*, p. 463,

¹ The incorporation of the company employing the accused may be shown by parol. *State v. Cheek*, 63 Mo. 364.

simplifies the case so far as these persons are concerned. Before the passing of that act, a collector of poor and other rates in the parish of St. Paul, Covent Garden, was held by Vaughan and Patteson, JJ., to be rightly described under a local act (10 Geo. 4, c. lxviii.) as in the employ of the committee of management of the affairs of the parish, though he was elected by the vestrymen of the parish. *R. v. Callahan*, 8 C. & P. 154, 34 E. C. L. But an assistant overseer, appointed and paid by the guardians of a union, was held not to be the servant of the overseers. *R. v. Townsend*, 1 Den. C. C. 167. On *469] an indictment against the clerk of a savings' bank, the judges held that he was properly described as clerk of the trustees, although elected by the managers. *R. v. Jenson*, 1 Moo. C. C. 434. So it was held that the secretary of a society appointed by the society generally, might be described as the servant of the trustees. *R. v. Hall*, 1 Moo. C. C. 474. And the clerk of a friendly society may be described as the servant of the trustees. *R. v. Miller*, 2 Moo. C. C. 249. See 38 & 39 Vict. c. 60.

In *R. v. Beaumont*, Dears. C. C. 270; 23 L. J., M. C. 54, it appeared that one W. had engaged with a railway company to find horses and carmen to deliver the company's coals, and that he or his carmen should deliver to the company's manager all the money received from the customers. The delivery notes were entered by W. in his book, and the receipted invoices given to the customers. The prisoner was one of W.'s carmen, whose duty it was to pay over directly to the manager the money which he received from the customers. No account of money so received and paid was kept between W. and the company. It was held by a majority of the Court of Criminal Appeal that the prisoner was the servant of the company and not of W., and that the money was received by him on their account and not on the account of W., and that consequently an indictment against the prisoner, as the servant of W., for embezzling money as received in that capacity, could not be supported. A somewhat similar case was that of *R. v. Thorpe*, Dears. & B. C. C. 562. There C. H. was agent for a railway company for delivering goods, under a contract very similar to the last, but the points of difference, though minute, were important; because here the court thought that an indictment against the prisoner, as servant of C. H., for embezzling money received from one of the persons to whom goods were delivered under a contract could be sustained. The chief point of difference between the two contracts appears to be that in the latter case the master was liable to account to the railway company for the money received by his carmen; in the former not.

In *R. v. Foulkes*, L. R., 2 C. C. 150; 44 L. J., M. C. 65, the prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board, and there was no evidence that he received any salary from his father.

The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use. It was held, that there was evidence that the prisoner was a clerk or servant to his father, or employed as a clerk or servant by him, and was guilty of embezzlement.

There is also a civil case which is frequently referred to on this subject. In *Quarman v. Burnett*, 6 M. & W. 499, the owners of a carriage were in the habit of hiring horses from the same person to draw it for a day or for a drive; the owner of the horses provided a driver, who was always the same person, he being a regular coachman in the employment of the owner of the horses; the coachman was paid by the owners of the carriage a fixed sum for each drive, and provided by them with a livery, which he left at the house at the end of each drive. It was held that this coachman was not the servant of the *owners of the carriage so as to make them liable for an injury [470 caused by his negligence.

Upon this part of the law compare also the cases in the last heading.

Persons in the Queen's service. The prisoner was, with the sanction of the treasury, employed by the inspector of prisons, who was authorized to receive the contributions of parents towards the maintenance of their children committed to reformatory and industrial schools, as his agent, to collect and take proceedings for the recovery of such contributions under 29 & 30 Vict. cc. 117, 118, which authorizes the appointment of an agent. While the prisoner was so employed he received and misappropriated moneys, the contributions of parents, ordered by magistrates, under the above statutes, to be paid for the maintenance of their children in the schools; these moneys being by virtue of the same statutes the property of the treasury. It was held that the prisoner was, while so employed, in the public service of the Queen, and could be convicted of embezzlement under 24 & 25 Vict. c. 96, s. 70. *R. v. Graham*, 13 Cox, C. C. R. 57.

For or in the name or on the account of his master. Frequently there has been no doubt that the prisoner is a clerk or servant, but he has been held not liable to be convicted, because the money which he has appropriated was not received, in the words of the 7 & 8 Geo. 4, c. 29, s. 47, "by virtue of his employment." In the present statute (24 & 25 Vict. c. 96, s. 68) the words "by virtue of his employment" are omitted, although they occur in section 70 with respect to persons in the public service and the police. Mr. Greaves says that these words were advisedly omitted in order to enlarge the enactment, and to get rid of some of the following decisions: *Greaves' Crim. Stat.* p. 117. *R. v. Thorley*, 1 Moo. C. C. 353. *R. v. Mellish*, Russ. & Ry. 80. *R. v. Snowley*, 4 C. & P. 390, 19 E. C. L., *per* Parke, B. *v. Harris*, 1 Dears. C. C. 334; 23 L. J., M. C. 110. *R. v. Gooddy*, 8 C. & P. 665, 34 E. C. L., and others.

It has, however, been held not to be necessary, even under the re-

pealed statute, that the servant should have been acting in the ordinary course of his employment when he received the money, provided that he was employed by his master to receive the money on that particular occasion. The prisoner was employed to collect the tolls at a particular gate, which was all that he was hired to do; but on one occasion his master ordered him to receive the tolls of another gate, which the prisoner did, and embezzled them. Being indicted (under the repealed statute 39 Geo. 3, c. 85) for his embezzlement, a doubt arose whether it was by virtue of his employment, and the case was reserved for the opinion of the judges. Abbott, C. J., Holroyd, J., and Garrow, B., thought that the prisoner did not receive the money by virtue of his employment, because it was out of the course of his employment to receive it. But Park, Burrough, Best, and Bayley, JJ., and Hullock, B., thought otherwise; because, although out of the ordinary course of the prisoner's employment, yet as, in the character of servant, he had submitted to be employed to receive the money, the case was within the statute. *R. v. Smith, Russ. & Ry.* 516. See *ante*, p. 464.

So although it may not have been part of the servant's duty to receive money, in the capacity in which he was originally hired, yet *471] *if he has been in the habit of receiving money for his master, he is within the statute. Thus, where a man was hired as a journeyman miller, and not as a clerk or accountant, or to collect money, but was in the habit of selling small quantities of meal on his master's account, and of receiving money for them, Richards, C. B., held him to be a servant within the repealed statute 39 Geo. 3, c. 85, saying that he had no doubt the statute was intended to comprehend masters and servants of all kinds, whether originally connected in any particular character and capacity or not. *R. v. Barker, Dow & Ry.* N. P. C. 19.

Where the prisoner was intrusted to receive from certain porters such moneys as they had collected from the customers in the course of the day, the receiving immediately from the customers, instead of receiving through the medium of the porters, was held such a receipt of money by "virtue of his employment," as the act was meant to protect. *R. v. Beechy, Russ. & Ry.* 319. Upon the same principle, where a person employed by a carrier was directed by his employer to receive a sum of 2*l.*, which he did receive and embezzled, on a case reserved, the judges were of opinion that he was rightly convicted of embezzlement. *R. v. Spencer, Russ. & Ry.* 299. So where a drover keeping cattle for a farmer at Smithfield, was ordered to drive the cattle to a purchaser, and receive the money, which he did, and embezzled it, the judges were unanimously of opinion that the prisoner was a servant within the meaning of the act, and that the conviction was right. *R. v. Hughes*, 1 Moo. C. C. 370. In *R. v. Tongue*, 30 L. J., M. C. 49, the Court of Criminal Appeal held, affirming the above principle, that the employment to receive money was sufficient, though it was not the prisoner's usual duty to receive money. And see *R. v. Hastie*, 1 L. & C. 269; 32 L. J., M. C. 63.

In all the above cases the money was received "for or in the name or on the account of" the master, which are the words contained in the present section, p. 459; and although it is no longer necessary to show that the money was received "by virtue of the employment," yet it is essential to show that the money was the master's property; and where a servant, contrary to express orders, and not for, or on account of his master, but by using his master's barge for his own advantage, earned money by a charge for freight, it was held that such money was not received by him on account of his master, and was in no sense his master's property, and therefore he could not be convicted of embezzlement in keeping it. *R. v. Cullum*, L. R. 2 C. C. 28; 42 L. J., M. C. 64. In *R. v. Gale*, 2 Q. B. D. 141; 46 L. J., M. C. 134, the prisoner's duty was to get cheques cashed at the bank; but instead of doing so, he got a friend to give him cash for two cheques and then appropriated the money. He was charged with embezzlement, not of the cheques, but of the money, and it was held that he had received the money for and on account of his master. In *R. v. Read*, 3 Q. B. D. 131; 47 L. J., M. C. 50, a gamekeeper killed rabbits on his master's land without authority, and sold them; it was held that he did not receive them "for or on account of his master." See this case next page.¹

Nature of the offence of embezzlement. Embezzlement is only a species of larceny. It is in every respect a precisely similar crime to that which is committed by a servant who receives property from his master, and appropriates it. This is larceny, because the possession of *the master continues in law until the wrongful appropriation [*472 by the servant takes place. The case which was held not to be larceny was that of a banker's clerk who received money from a customer and appropriated it, and the reason given was that, as the employer had never had possession of the money, he had never been wrongfully deprived of the possession of it, which was a necessary ingredient in the crime of larceny. *R. v. Bazeley*, 2 East, P. C. 571. The effect of the repealed statute 39 Geo. 3, c. 85, which was passed in consequence of this decision, was to make the master's possession commence from the moment that his property came into the servant's hands, and see now the present statute, s. 68, *supra*, p. 458. In *R. v. Read*, 3 Q. B. D. 131; 47 L. J., M. C. 50, where a gamekeeper wrongfully captured and killed wild rabbits in his master's woods, and sold them, it was attempted to bring the offence within the embezzlement statute, but the Court of Crown Cases Reserved, held that the rabbits could not be said to have been taken into possession by him "on account of his master," within 24 & 25 Vict. c. 96, s. 68. The argument of counsel turned principally upon the question whether the master had ever had possession of the rabbits.

¹So where one is employed to sell upon commission, the money received therefor is not "on account of his master," and he cannot be convicted of embezzlement in keeping it. *Carter v. State*, 53 Ga. 526. *Contra*, where the commissions are paid by the employer and the agent is not authorized to deduct them from the proceeds of sales. *Commonwealth v. Smith*, 129 Mass. 104.

Distinction between larceny and embezzlement. It seems hardly necessary after the passing of the 24 & 25 Vict. c. 96, s. 68, *supra*, p. 458, to keep up the distinction between larceny and embezzlement, especially as, if the principle of the possession of the servant being the possession of the master had been interpreted with the same latitude in criminal and civil cases, for which there seems to be no reason to the contrary, that statute would have been altogether unnecessary. By the 24 & 25 Vict. c. 96, s. 72 (*supra*, p. 460), where a person is indicted for embezzlement, he is not to be acquitted altogether, if the offence turns out to be larceny, but he may be found not guilty of embezzlement and guilty of larceny. And *vice versa* on an indictment for larceny. But this does not enable a jury to find a prisoner guilty of larceny on facts which amount to embezzlement; *R. v. Garbutt*, Dears. & B. C. C. 166; 26 L. J., M. C. 47; so that even now the distinction must still be observed. What the distinction is, is obvious enough from the account of the origin of embezzlement as a separate offence in the last section. In *R. v. Masters*, 1 Den. C. C. 332, it was held that where money was received on account of his master by one servant, and by him handed to another in due course of business, and the latter appropriated it, that this was embezzlement, as the master had clearly never had possession by the first servant any more than by the second. So where the servant was sent by his master to get change for a 5*l.* note, which he did, and then appropriated the change to his own use, it was held that as the master had never had possession of the change, this was embezzlement, and not larceny. *R. v. Sullen*, 1 Moo. C. C. 129. The prosecutors suspecting the prisoner, desired a neighbor to go to their shop and purchase some articles, and pay for them with some marked money which they supplied for the purpose. This was done, and the prisoner appropriated the money. It was contended that this was larceny and not embezzlement, as the money was in law always in the master's possession. But the prisoner was convicted of embezzlement, and the conviction held right. *R. v. Hedge*, Russ. & Ry. 162; 2 Leach, 1033; and this case was followed in *R. v. Gill*, 1 Dears, C. C. 289; 23 L. J., M. C. 50. See also *infra*, tit. "Larceny."

*473] ***Proof of embezzlement.** The first possession being lawful, the act of embezzlement consists in a mere act of the mind without any outward and visible trespass as in many cases of larceny, and in all crimes of violence. That this mental act of fraudulent appropriation has taken place has to be inferred from the conduct of the prisoner, or from his own admissions.¹ The case of *R. v. Smith*,

¹ On the trial of a tax collector for embezzlement, the books of the Comptroller-General properly certified are admissible to show that the collector has failed to pay over the taxes collected by him. *Shivers v. State*, 53 Ga. 149. To sustain an indictment for embezzlement, there must be proof, first, that the person charged was in the employ of the prosecutor; second, that he obtained the money by virtue of his employment; third, that he has converted it or concealed it with the intent to convert it. *Pullam v. State*, 78 Ala. 31. It is not embezzlement for an agent to refuse to pay the money of a principal on demand, unless the person demanding it has authority so to

Russ. & Ry. 516, in which the master had given his servant money to pay taxes which the collector had never received, was, if anything, larceny, though the remarks of the judges were applicable to embezzlement. It is clear that, as there stated, the bare non-application of money in the manner directed is not sufficient whereon to convict a person of embezzlement. For all that appeared in that case, the servant had never appropriated the money at all. The same remarks apply to the case of *R. v. Hodgson*, 3 C. & P. 423, 14 E. C. L., where it was admitted that the prisoner had made no false entry, and that he had charged himself in the books with all the moneys which he had received, but it was imputed to him that he had not sent the amount of three items to his employers as he ought to have done. But, on the other hand, it is clearly settled that a prisoner, by making an admission in his account that he has received the money, does not thereby necessarily free himself from the charge of embezzlement, if there be other circumstances from which the jury may infer that the money was fraudulently appropriated. *R. v. Lister*, Dears. & B. C. C. 118. Any doubt on this point arises from not keeping clearly in view the distinction between the offence and the evidence of it. See the next heading, and *R. v. Guelder*, 30 L. J., M. C. 34. Evidence may be given of other acts of embezzlement in order to show that a wilful embezzlement and not a mere mistake has been committed. See *ante*, p. 102.

Venue—**At what time the offence is committed.** There is sometimes difficulty in ascertaining the precise time when the embezzlement takes place, which is important upon the question of venue. In general there can be no evidence of the act of embezzlement until the party who has received the money refuses to account, or falsely accounts for it. Where the prisoner received the money in Shropshire, and told his master in Staffordshire that he had not received it, the question was, whether he was properly convicted for the embezzlement in the former county. On a case reserved, the conviction was held right. Lawrence, J., thought that embezzlement being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other judges were of opinion, that the indictment might be in Shropshire where the prisoner received the money, as well as in Staffordshire, where he *embezzled it*, by *not accounting for it to his master*; that the statute having made receiving money and embezzling it a larceny, made the offence a felony where the property was first taken, and that the offender might, therefore, be indicted in that or any other county into which he carried the property. *R. v. Hobson*, 1 East, P. C. Add. xxiv.; Russ. & Ry. 56. The doctrine, that the not accounting is the evidence of the embezzlement, was also laid down in the following

do from the principal. *People v. Tomlinson*, 66 Cal. 314. Under the Rhode Island statute the defendant is liable for embezzlement if money comes into his possession by virtue of his agency, even though he has used fraud to obtain it. *State v. Taberner*, 14 R. I. 272.

case. The prisoner was indicted for embezzling money in Middlesex. It appeared that he received the money in Surrey, and returning into Middlesex, denied to his master the receipt of the money. *474] It was objected that he ought to have been *indicted in Surrey, and the point was reserved. Lord Alvanley, delivering the opinion of the judges, after referring to the last case, said, "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money until he had returned into the county of Middlesex. In cases of this sort, the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the thing to his own use. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pass them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of the Blackfriars Bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute, *until he is called upon by the master to account*. When so called upon, he denied that he had ever received it. That was the first act from which the jury could with certainty say, that the prisoner intended to embezzle the money. There was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute, *until he refused to account to his master*." *R. v. Taylor*, 3 Bos. & Pul. 596; 2 Leach, 974; Russ. & Ry. 63. The prisoner was a travelling salesman, whose duty it was to go to Derbyshire every Monday to sell goods and receive money for them there, and return with it to his master in Nottinghamshire every Saturday. He received two sums of money for his master in Derbyshire, but never returned to render any account of them. Two months afterwards he was met by his master in Nottinghamshire, who asked him what he had done with the money, and the prisoner said he was sorry for what he had done; he had spent it. It was held, under these circumstances, that the prisoner was rightly indicted in Nottinghamshire, there being some evidence to go to the jury of an embezzlement in that county. *R. v. Murdock*, 2 Den. C. C. R. 298; s. c. 21 L. J., M. C. 22. Where there was evidence of a conversion in Yorkshire, and a letter sent by the prisoner to Middlesex, in substance denying the receipt of the money, the prisoner was held to have been rightly tried in Middlesex, though he might have been tried in Yorkshire. *R. v. Rogers*, 3 Q. B. D. 28; 47 L. J., M. C. 11. See *post*, "False Pretences."

It is impossible to avoid seeing that these decisions are colored with the error, that a denial of the receipt or omission to account is necessary to constitute the crime of embezzlement, and that the distinction already adverted to between the offence and the evidence of it is not

always kept in view. *R. v. Davison*, 7 Cox, C. C. 158, and see the judgment of Huddleston, B., dissenting from the majority of the court in *R. v. Rogers*, *supra*. It is, however, only reasonable where there is no indication of the time at which the money was appropriated, to conclude that this act took place at the same time as the first indication of it, viz., the refusal to account, or the omission to do so at the proper time.¹ As to falsification of accounts, see the statute, *ante*, p. 462.

*Where a claim is set up, though unfounded. Upon an indictment for embezzlement, it appeared that the prosecutors were owners of a vessel, and the prisoner was in their service as the master. The vessel carried culm from Swansea to Plymouth, which, when weighed at Plymouth, weighed 215 tons, and the prisoner received payment for the freight accordingly. When he was asked for his account by the owner, he delivered a statement acknowledging the delivery of 210 tons, and the receipt of freight for so much. Being asked whether this was all that he had received, he answered that there was a difference of five tons between the weighing at Swansea and Plymouth, and that he had retained the balance for his own use, according to a recognized custom between owners and captains in the course of business. But there was no evidence of the alleged difference of weight, or of the custom. Cresswell, J., held that this did not amount to embezzlement. Embezzlement necessarily involved secrecy; the concealment, for instance, by the defendant of his having appropriated the money. If instead of his denying his appropriation, a defendant immediately owned it, alleging a right or an excuse for retaining the sum, no matter how frivolous the allegation, and although the fact itself on which the allegation rested were a mere falsification; as if, in the present case, it should turn out that there was no such difference as that asserted by the defendant between the tonnage at Swansea and at Plymouth, or that there was no such custom as that set up, it would not amount to embezzlement. *R. v. Norman*, Carr. & M. 501, 41 E. C. L.² Perhaps this case may be explained on the ground that the claim set up, though it might be frivolous, was accepted by the master. The prisoner could then be indicted for obtaining money by false pretences.

Absconding—evidence of embezzlement. Where the prisoner was sent to receive money due to her master, and on receiving it went off to Ireland, Coleridge, J., held that the circumstance of the prisoner having quitted her place and gone off to Ireland, was evidence

¹ Proof that defendant received the money in the county named in the indictment is enough in the first instance in the absence of evidence from the defendant that he carried the money into another county in the course of his duty and before any unlawful conversion of it. *State v. New*, 22 Minn. 76.

² On an indictment under the National Banking Act for embezzlement the accused cannot prove as a defence that his appropriation of the funds was not for his own benefit, and that it was known to and sanctioned by the President and Directors of the Bank. *United States v. Taintor*, 11 Blatchf. 374.

from which the jury might infer that she intended to embezzle the money. The prisoner was convicted. *R. v. Williams*, 7 C. & P. 331, 32 E. C. L.

Particularity with which the crime must be laid and proved. Where the prisoner received several sums of money, and his accounts do not fix him with the embezzlement of any specific sum at a specific time, the crime is very difficult of proof. In *R. v. Hall*, Russ. & Ry. 463; 3 Stark. 671, 3 E. C. L., the prisoner received on account of his masters 18*l.* in one-pound notes; he immediately entered in the books of his employers 12*l.* only as received, and accounted to them only for that sum. In the course of the same day he received 104*l.* on their account, which he paid over to them that evening with the 12*l.* It was urged for the prisoner that this money might have included all the 18*l.* in one-pound notes, and if so, he could not be said to have embezzled any of them. The prisoner being convicted, on a case reserved, nine of the judges held the conviction right, being of opinion that from the time of making the false entry, it was an embezzlement. Wood, B., doubted whether it could be considered an embezzlement, and Abbott, C. J., thought that the point should have been left to the jury, and that the conviction was wrong.

It was held upon the repealed statute 39 Geo. 3, c. 85, that the *476] indictment ought to set out specially some article of the property embezzled, and that the evidence should support that statement. Therefore, where the indictment charged that the prisoner embezzled the sum of *one pound eleven shillings*, and it did not appear whether the sum was paid by a one-pound note and eleven shillings in silver, or by two notes of one pound each, or by a two-pound note, and change given by the prisoner; on a case reserved, the judges were of opinion that the indictment ought to set out specifically, at least, some articles of the property embezzled, and that the evidence should support the statement, and they held the conviction wrong. *R. v. Furneaux*, Russ. & Ry. 335; *R. v. Tyers*, Id. 402. But by the repealed statute 7 & 8 Geo. 4, c. 29, s. 48, and now by the 24 & 25 Vict. c. 96, s. 71, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin, or valuable security, and such allegation, so far as it regards the description of property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin, or valuable security, of which such amount was composed, shall not be proved. But where an indictment alleged an embezzlement of money, and the evidence was that the prisoner had embezzled a cheque, but there was no evidence that he had converted it into money; it was held that the evidence did not support the indictment. *Reg. v. Keena*, L. R., 1 C. C. R. 113; 37 L. J., M. C. 43.

It was the duty of the prisoner, who was a banker's clerk, to receive money and to put it either into a box or a till, of each of which he kept the key, and to make entries of his receipts in a book; the balance of each evening being the first item with which he debited

himself in the book the next morning. On the morning of the day in question he had thus debited himself with 1,762*l.*, and at the close of business on the latter day he made the balance in the "money book" 1,309*l.* On being called upon in the evening by one of his employers to produce his money, he threw himself upon his employers' mercy, saying he was about 900*l.* short. On examination it was found that the prisoner, instead of having 1,309*l.* had only 345*l.*, making the actual deficiency 964*l.* The jury having found the prisoner guilty, upon an indictment of embezzling "money to a large amount, to wit, 500*l.*;" a majority of the judges (eight to seven), after very considerable doubts, were of opinion that there was sufficient evidence to go to the jury, of the prisoner having received certain moneys on a particular day, and for them to find he had embezzled the sum mentioned in the indictment. *R. v. Grove*, 7 C. & P. 635, 32 E. C. L.; 1 Moo. C. C. 447. But in a subsequent case, *Alderson, B.*, after stating that the determination in the above case proceeded more upon the particular facts than upon the law, said, "It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." *R. v. Jones*, 8 C. & P. 288, 34 E. C. L. It was the duty of a clerk to receive money for his employer, and pay wages out of it, to make entries of all moneys received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he, from time to time, paid over his balance to his employer. Having entries of weekly payments in his first book amounting to 25*l.* he entered them in the second as 35*l.*; and two months after, in accounting with his employer, by these means made his balance 10*l.* too little, *and paid it over accordingly. *Williams, J.*, held that the clerk could not, on these facts, be convicted of embezzlement, [*477 without its being shown that he had received some particular sum on account of his employer, and had converted either the whole or part of it to his own use. *R. v. Chapman*, 1 C. & K. 119, 47 E. C. L.; and see *R. v. Wolstenholme*, 11 Cox, C. C. 313.

There is still likely to be much difficulty on this point. Where a person is employed in the receipt and payment of money it is almost impossible to prove anything more than a deficiency in account, and if the words of *Alderson, B.*, in *R. v. Jones*, *supra*, were to be taken in their strict sense, it would be impossible ever to procure a conviction for embezzlement where there were running accounts between the parties. It is suggested that there is some misapprehension of the principles of law applicable to this question. As has already been said, the first statute of embezzlement, 39 Geo 3, c. 38 (now repealed), was passed to meet a particular case which was held not to be larceny, namely, the appropriation of money by a clerk received by him from a customer on account of his master, *supra*, p. 470. Very strong arguments could be used to show that this was larceny at common law, the only difficulty that the judges had in the case referred to being about the trespass, and they seemed timid about extending the doctrine of constructive possession. But now that that difficulty has

been removed by the legislature, embezzlement stands on precisely the same footing as larceny by a servant: if money be continually passing from the master to the servant, and the servant, instead of applying it to the purposes indicated, appropriates any part of it to his own use, he is guilty of larceny; and in the numberless cases which must have occurred of this kind no one has ever thought of objecting that the servant could not be convicted of larceny, because he could not be shown to have received a particular sum, and to have appropriated a part or the whole of that particular sum. And what difference can it make now that the possession of the servant is made the possession of the master in all cases, that the money was received not from the master, but from third persons on account of the master?

There is a case of *R. v. Moah*, Dears. C. C. 626; 25 L. J., M. C. 66, which was decided on the repealed statute 2 Will. 4. c. 4, s. 1, which corresponds to the 24 & 25 Vict. c. 96, s. 70 (*supra*, pp. 459, 470). There the prisoner was an officer of receipt of inland revenue, and he was allowed to retain in his hands a balance of 300*l*. According to his accounts sent in to the Board, there stood a balance against him of more than 5,000*l*. Upon inquiry being made, he said he was not prepared to hand over the balance, or any part of it. He was then reminded that there was a sum of 300*l*. which he had received at a particular place on the previous Monday, and which was not included in his accounts. He then handed over 281*l*., and a fraction, and said that was all the money he had in the world. It was held that a conviction might be sustained for embezzling the 300*l*.; but as to the 5,000*l*., the court thought it was a matter of doubt.

Where the prisoner had to account weekly in gross sums, and he was alleged in the indictment to have embezzled three such sums, it was held that such aggregate sums might be shown to be made up of smaller sums which he had embezzled, and with the embezzlement of which he might have been charged. *R. v. Balls*, L. R. 1 C. C. R. 328; 40 L. J., M. C. 148.

*478] ***Particulars of the embezzlement.** Though it is not necessary to state in the indictment from whom the money, etc., was received, the judge before whom the indictment is found will order the prosecutor to furnish the prisoner with a particular of the charges, upon the prisoner making an affidavit that he is unacquainted with the charges, and that he has applied to the prosecutor for a particular, which has been refused. *R. v. Bootyman*, 5 C. & P. 300, 24 E. C. L. Where three acts of embezzlement were stated in the indictment, the prisoner moved, upon affidavit, for an order directing the prosecutor to furnish a particular of the charges; notice of the motion had been given. Vaughan, B., to whom the application was made, said, "I think you ought to apply to the other side to furnish you with a particular, and, if they refuse, I will grant an order. The clause of the repealed statute 7 & 8 Geo. 4, c. 29, respecting the framing of indictments for embezzlement, causes great hardships to prisoners. What information does the indictment convey to such a man as this? As a clerk in a coach office he must

have received money from many hundred persons. I should, therefore, recommend the prisoner's attorney to apply to the prosecutor for a particular; and I think the prosecutor ought at least to give the names of the persons from whom the sums of money are alleged to have been received, and, if the necessary information be refused, I will, on an affidavit of that fact, grant an order, and put off the trial." *R. v. Hodgson*, 3 C. & P. 422, 14 E. C. L. See also 1 Chit. Rep. 698; and *supra*, p. 194.¹

Proof of the thing embezzled. The 24 & 25 Vict. c. 96, s. 71, *supra*, p. 459, allows great latitude in the description of money or valuable securities in indictments for embezzlement; and by the same section it is sufficient if any part of the money or valuable securities described in the indictment be proved to have been embezzled. The same rules of description will apply to chattels as in larceny; see that tit. *infra*. See also the general rules applicable to descriptive averments, *supra*, p. 87.²

Proof of embezzlement by officers, etc., of the Banks of England and Ireland. It was held under the repealed statute 15 Geo. 2, c. 13, s. 12, that it was not sufficient, in order to bring a party within the statute, that he should be an officer of the bank, and as such, *have access* to the document in question. It must appear also that he was *intrusted* with it. A bank clerk, employed to post into the ledger, and read from the cash-book, bank-notes in value from 100*l.* to 1,000*l.*, and who, in the course of that occupation, had, with other clerks, access to a file upon which *paid notes* of every description were filed, took from the file a paid bank-note for 50*l.* Being indicted for this, it was contended that he was not *intrusted* with this note within the statute, the only notes with which he could be said to be intrusted being those between 100*l.* and 1,000*l.* Having been found guilty, the judges held the conviction wrong, on the ground that it did not appear that he was *intrusted* with the cancelled note, though he had *access* to it. *R. v. Bakewell*, Russ. & Ry. 35.

Where the prisoner was charged with embezzling "certain bills, commonly called exchequer bills," and it appeared that the bills had been signed by a person not legally authorized to sign them, it was held that the prisoner could not be convicted. *R. v. Aslett*, 2 Leach, 954. The prisoner was again indicted under the same statute, for "embezzling 'certain effects' of the bank, and being convicted, the judges, on a case reserved, were of opinion that [*479 these bills or papers were *effects* within the statute; for they were issued under the authority of government as valid bills, and the holder had a claim on the justice of government for payment. *R. v. Aslett*, Russ. & Ry. 67; 2 Leach, 958; 1 N. R. 1. See now 24 & 25 Vict. c. 96, s. 1, *infra*, tit. "Larceny."

¹ An indictment for embezzling money received from contributors of an association, to be paid to the association, is not sustained by evidence of a specific trust to pay the same to the treasurer. *Commonwealth v. O'Keefe*, 121 Mass. 59.

² *People v. Cox*, 40 Cal. 275. S.

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AN escape by a person in custody on a criminal charge may be either with or without force, or with or without the consent of the officer or other person who has him in custody.

Proof of escape by the party himself. All persons are bound to submit themselves to the judgment of law, and therefore, if any one, being in custody, frees himself from it by any artifice, he is guilty of a high contempt, punishable by fine and imprisonment. 2 Hawk. P. C. c. 17, s. 5.¹ And if by the consent or negligence of the gaoler the prison doors are opened, and the prisoner escapes, without making use of any force or violence, he is guilty of a misdemeanor. *Id.* c. 18, s. 9; 1 Hale, P. C. 611; 1 Russ. Cri. 567, 5th ed.

Proof of the criminal custody. It is laid down that it must be proved that the party was in custody upon a criminal charge, otherwise the escape is not a criminal offence.² 1 Russ. Cri. 569, 5th ed., but in *R. v. Allan*, Carr. & M. 294, 41 E. C. L., Erskine and Wightman, JJ., held that to aid a person confined under the warrant of the Commissioners for the relief of Insolvent Debtors to escape from custody, was a common law misdemeanor. *Post*, tit. "Rescue." The conviction may be proved in the manner provided by the 14 & 15 Vict. c. 99, s. 13, *ante*, p. 165.

Proof of escape suffered by an officer. In order to render a person suffering an escape liable, as an officer, it must appear that he was a known officer of the law. Thus, where the constable of the Tower

¹ *People v. Tompkins*, 9 Johns. 70; *People v. Washburn*, 10 Johns. 160; *People v. Rose*, 12 Johns. 339; *State v. Doud*, 7 Conn. 384. S. *Kennedy v. Commonwealth*, 14 Bush. (Ky.) 340; *State v. Lewis*, 19 Kan. 280.

² The identity of the person who escaped with the one convicted must be proved. *State v. Murphy*, 5 Eng. 74. S.

committed a prisoner to the house of a warder of the Tower, the latter was held not to be such an officer as the law took notice of, and that he could not therefore be guilty of a negligent escape. 1 Chetw. Burn, Escape, 930. But whoever *de facto* occupies the office of gaoler is liable to answer for such an escape, and it is no way material whether his title to such an office be legal or not. Hawk. P. C. b. 2, c. 19, s. 28.

*It is said by Hawkins to be the better opinion that the sheriff is as much liable to answer for an escape suffered by [*481 his bailiff as if he had actually suffered it himself; and that either the sheriff or the bailiff may be charged for that escape. Hawk. P. C. b. 2, c. 19, s. 28; 1 Hale, P. C. 597; 1 Russ. Cri. 571, 5th ed. But this is opposed to the authority of Lord Holt, who says that the sheriff is not answerable criminally for the acts of his bailiff. R. v. Fell, 1 Salk. 272; 1 Lord Raym. 424.¹

Proof of escape suffered by an officer—proof of arrest. In case of a prosecution against an officer, either for a voluntary or negligent escape of a prisoner in custody for a criminal offence, it must appear that there was an actual arrest of the offender. Therefore where an officer, having a warrant to arrest a man, sees him in a house and challenges him to be his prisoner, but never actually has him in his custody, and the party gets free, the officer cannot be charged with the escape. 2 Hawk. P. C. c. 19, s. 1. See *Simpson v. Hill*, 1 Esp. 431.

Proof of arrest—must be justifiable. The arrest must be justifiable in order to render the escape criminal; and it is laid down as a good rule that whenever an imprisonment is so far irregular as that it is no offence in the prisoner to break from it by force, it will be no offence in the officer to suffer him to escape. 2 Hawk. P. C. c. 29, s. 2. A lawful imprisonment must also be continuing at the time of the escape; and therefore, if an officer suffers a criminal who was acquitted and detained for his fees to escape, it is not punishable. *Id.* ss. 3, 4. Yet if a person convicted of a crime be condemned to imprisonment for a certain time, and *also till he pays his fees*, and he escape after such time is elapsed without paying them, perhaps such escape may be criminal, because it was part of the punishment that the imprisonment should continue till the fees were paid. But it seems that this is to be intended where the fees are due to others as well as to the gaoler. *Id.* s. 4.

Proof of voluntary escape. It is not every act of releasing a prisoner that will render an officer subject to the penalties of voluntarily permitting an escape. The better opinion appears to be that the act must be done *malo animo*, with an intent to defeat the progress of

¹ An indictment for a negligent escape will only lie against those officers upon whom the law casts the obligation of safe custody, and not against the mere servants of such officers. *State v. Errickson*, 3 Vr. 421. S.

justice. Thus, it is said by Hawkins, that it seems agreed that a person who has power to bail is guilty only of negligent escape, by bailing one who is not bailable; neither, he adds, is there any authority to support the opinion that the bailing of one who is not bailable, by a person who has no power to bail, must necessarily be esteemed a voluntary escape. And there are cases in which the officer has knowingly given his prisoner more liberty than he ought, as to go out of prison on promise to return; and yet this seems to have been adjudged to be only a negligent escape. The judgment to be made, adds Hawkins, of all offences of this kind must depend on the circumstances of the case: as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning, and the intention and motives of the officer. Hawk. P. C. b. 2, c. 19, s. 10; 1 Russ. Cri. 570, 5th ed.

Proof of voluntary escape—retaking. It is laid down in some *books that after a voluntary escape the officer cannot re-
 *482] take the prisoner by force of his former warrant, for it was by the officer's consent. But if the prisoner return, and put himself again under the custody of the officer, the latter may lawfully detain him, and bring him before a justice in pursuance of the warrant. 1 Burn, 930, tit. "Escape," citing Dalt. c. 169; 2 Hawk. c. 13, s. 9; 1 Russ. Cri. 571, 5th ed. But Hawkins observes, that the purport of the authorities seems to be no more than this, that a gaoler who has been fined for such an escape shall not avoid the judgment by retaking the prisoner; and he adds, "I do not see how it can be collected from hence that he cannot justify the retaking him." Hawk. P. C. b. 2, c. 19, s. 12.

Proof of negligent escape. A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrested or imprisoned him, and is not freshly pursued and taken before he is lost sight of. Dalt. c. 159; 1 Chetw. Burn, 930, "Escape." Thus, if a thief suddenly, and without the consent of the constable, hang or drown himself, this is a negligent escape. Id. It is said by Lord Hale, that if a prisoner for felony breaks the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the gaoler or his officers that should have prevented it. 1 Hale, 600. But upon this passage it has been remarked that it may be submitted that it would be competent to a person charged with a negligent escape under such circumstances to show that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security.¹ 1 Russ. Cri. 570, 5th ed.

¹ When an escape is shown, the law implies negligence on the part of the sheriff in whose custody the prisoner was placed, and it is not necessary to prove specific negligence to insure conviction. The accused can only clear himself by showing that the escape was made possible by the act of God, or other irresistible adverse force. The

Proof of negligent escape—retaking. Where a prisoner escapes through the negligence of the gaoler, but the latter makes such fresh pursuit as not to lose sight of him until he is retaken, this is said not to be an escape in law; but if he loses sight of him, and afterwards retakes him, the gaoler is liable to be punished criminally. It is scarcely necessary to add that the sheriff or gaoler, though he had no other means of retaking his prisoner, would not be justified in killing him in such a pursuit. *Hawk. P. C. b. 2, c. 19, ss. 12, 13; 1 Hale, P. C. 602.*

Proof of escape from the custody of a private person. The evidence upon an indictment against a private person, for the escape of a prisoner from his custody, will in general be the same as on an indictment against an officer. A private person may be guilty either of a voluntary or of a negligent escape where he has another lawfully in his custody. Even where he arrests merely on suspicion of felony (in which case the arrest is only justifiable if a felony be proved), yet he is punishable if he suffer the prisoner to escape. *Hawk. P. C. b. 2, c. 20, s. 2.* And if in such case he deliver over the prisoner to another private person, who permits the escape, both, it is said, are answerable. *Id.* But if he deliver over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody there is an escape, he is not liable. *Id. s. 3; 1 Russ. Cri. 576, 5th ed.*

***Punishment.** A negligent escape in an officer is punishable now by a fine imposed on the party, at the discretion of the [*483 court. 2 *Hawk. c. 19, s. 31; 1 Hale, P. C. 600.*

A voluntary escape in an officer amounts to the same kind of offence, and is punishable in the same degree as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. But the officer cannot be thus punished until after the original delinquent has been found guilty, or convicted; he may, however, before the conviction of the principal party, be fined and imprisoned for a misdemeanor. 2 *Hawk. c. 19, s. 26; 1 Hale, P. C. 598, 599; 4 Comm. 130.*

Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both. 2 *Hawk. c. 20, s. 6.*

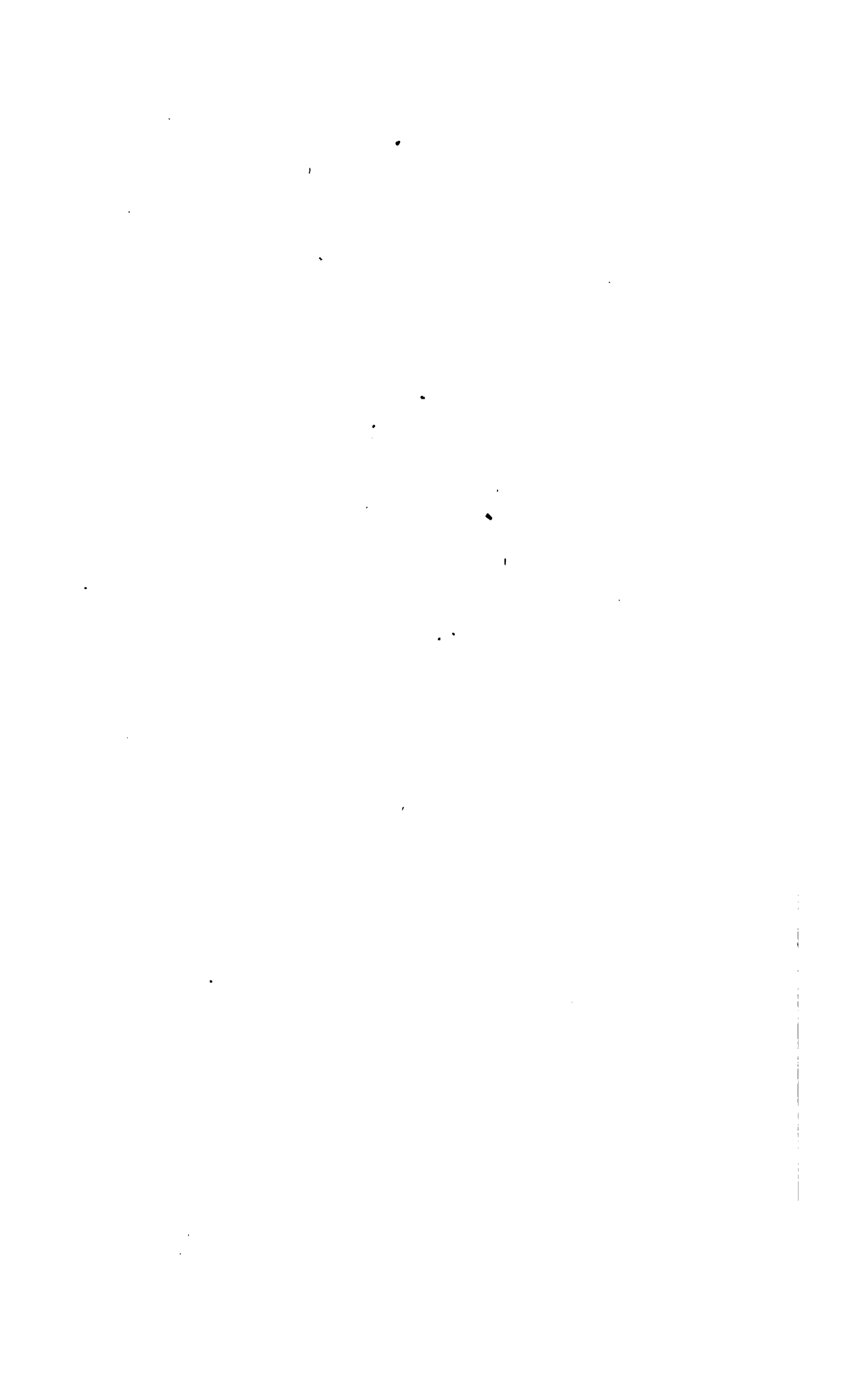
As to escapes from Parkhurst prison, see the 1 & 2 *Vict. c. 82, s. 53; from Pentonville prison, the 5 Vict. sess. 2, c. 29, ss. 24, 25; from Millbank prison, 6 & 7 Vict. c. 26, ss. 22, 23.*

Aiding in escape. By the 28 & 29 *Vict. c. 126, s. 37*, every person who aids any prisoner in escaping or attempting to escape from

insecurity of the gaol constitutes no defence. *Shattuck v. State, 51 Miss. 575; State v. Baldwin, 80 N. C. 390; Wemple v. Glavin, 57 How. (N. Y.) 109.* In North Carolina, actual negligence is the test of guilt. The gaoler is only criminally responsible if this is shown. *State v. Johnson, 94 N. C. 924.* The fact that a warrant for the arrest of an offender on a charge of felony does not specify the kind of felony, will not avoid it, and constitutes no defence on an indictment against the sheriff for negligent escape. *Martin v. State, 32 Ark. 124.*

any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or other disguise or any letter, or other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labor for a term not exceeding two years. And see *post*, tits. "Prison Breach" and "Rescue."¹

¹ An indictment for aiding and assisting one lawfully arrested to escape must set forth the particular acts done by which the escape was rendered possible. *Commonwealth v. Filburn*, 119 Mass. 297. It need not, however, set out the particular crime for which the prisoner was arrested. *State v. Addock*, 65 Mo. 590.



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